



**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT**



**THE
ANTI-COUNTERFEITING
TRADE AGREEMENT
(ACTA):
AN ASSESSMENT**

INTA



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

**THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA):
AN ASSESSMENT**

Abstract

The ACTA was motivated by a desire to establish equivalent provisions in international trade agreements containing rules on anti-counterfeiting. This is important at a time when free trade agreements are being negotiated by different parties. For the European Union it is also of importance to protect EU intellectual property rights (IPR) as future EU competitiveness depends on its ability to move into higher value added activities such as those for which IPRs are important. At the same time international agreements on IPRs will only be sustainable when they have the support of all parties. Within the EU the ACTA has also been the source of some concerns regarding the non-transparent way it was negotiated and whether it meets to aims agreed by the European Parliament and Commission that it would be compatible with the existing *acquis communautaire* and the World Trade Organisation's Trade Related intellectual Property rights (TRIPs) Agreement.

This study was requested by the European Parliament's Committee on International Trade.

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1. EXECUTIVE SUMMARY

The Anti-Counterfeiting Trade Agreement ('ACTA') is motivated by the perceived lack of progress of multilateral enforcement of intellectual property rights.¹ Building on the equivalent provisions in EU and US bilateral and regional free trade agreements (FTAs), the ACTA parties sought to establish best practice international standards to which other countries could aspire or adhere. Proponents stressed the need to combat the increase in global piracy and counterfeiting, drawing on estimates of the scale of the problem, such as those from the OECD that suggested international trade in counterfeit and pirated products amounted to some \$200 billion in 2005² (excluding domestically produced goods and digital products distributed through the internet).

Formal negotiations were launched in October 2007 and concluded after 11 rounds in October 2010 in Tokyo, Japan. Negotiating parties included: Australia, Canada, Japan, the Republic of Korea, Morocco, New Zealand, Singapore, Switzerland, Mexico, the United States, and the European Union. The major emerging economies, China, Brazil and India appear not to have been formally invited to participate.

ACTA was controversial both in terms of the process and the substance of the negotiations. The decision to maintain secrecy until the release of draft text in mid-2010 was to prove a significant handicap to public understanding and support for the treaty. The secrecy allowed significant misapprehensions to develop, while making it difficult for negotiators to communicate the actual scale and content of what was being achieved. There were also concerns related to; when documents would be made public; whether public interest groups had the same access as business and rightholder groups; what effect and relationship ACTA would have with the TRIPS Agreement, when and how much time the European parliament would have to exercise its duties and prerogatives to properly evaluate the treaty.

Substantive areas of concern covered a range of issues including: the potential negative effect of ACTA on fundamental human freedoms and privacy; the possibility of requiring cut off of internet access to consumers that infringe the agreement; imposing liability on internet service providers that carry content that infringes the agreement; the potential negative effect of ACTA on access to medicines in Europe and in third countries.

Efforts to maintain secrecy did not prevent a heated debate on ACTA generated by leaked texts of proposals, evaluations and draft treaties and fuelled the suspicion that ACTA would entail a significant shift in the laws of ACTA countries and go significantly beyond the TRIPS Agreement.

This study finds that, in the case of the EU, ACTA does not entail such a significant shift in the EU *Acquis*, but that, while it is not fundamentally in conflict with the TRIPS Agreement, it is significantly more stringent and rightholder friendly than the TRIPS Agreement. Many of the

¹ For more on this see: M Kaminski, 'Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)', 34 YALE J. INT'L L. 247 (2009).

² OECD, *The Economic Impact of Counterfeiting and Piracy*, 2008. See http://www.oecd.org/document/4/0,3746,en_2649_34173_40876868_1_1_1_1,00.html (Accessed 22.04.2011).

substantive issues that raised concerns in the early position papers have been addressed or are entirely absent from the final agreed text. On the other hand ACTA also does not appear, on its own, to have a significant impact on the EU's innovative capacity or its global competitiveness. This is partly due to the relatively modest scale of the outcome, as well as the fact that ACTA will not require any change in the laws or regulations of significant competitor countries such as Brazil, India and China.

This study addresses two key questions regarding ACTA. Is it in conformity with the EU *Acquis*; and is it in conformity with the existing international obligations of the EU and its member states?

Conformity with the EU Acquis

The provisions of ACTA appear to rest, in most cases, within the boundaries of EU law. However, in some cases, ACTA is arguably more ambitious than EU law, in that it enables a degree of protection that appears to go beyond the limits established in EU law. The primary area of concern is that of border measures, especially the expansion of the scope of such measures to all other forms of intellectual property, except for patents. Other areas that need clarification include: whether the criteria for damages in ACTA (*i.e.*, the value of the goods or services concerned measured by market or retail price)³ fully match the criterion of "appropriateness of the damage to the actual prejudice suffered" envisaged in the IPR Enforcement Directive.⁴

In addition, there are concerns that the criminal measures do not fully reflect the conditions set by the European Parliament, in its position of 25 April 2007 on the IPRED2 proposal from the Commission.⁵ ACTA extends criminal measures of indirect commercial benefit, which may contradict the Parliaments position that acts 'carried out by private users for personal and not-for-profit purposes' were to be excluded from the scope of the IPRED2.

Conformity with TRIPS and the Doha Declaration on TRIPS and Public Health

Parties can implement national legislation that complies with both the ACTA and the TRIPS Agreement. However, while ACTA purports to build on the TRIPS Agreement, it does not, except in the most general terms (Article 1 ACTA), establish a consistent and workable framework for reading the two agreements together. Thus what may first appear to be gaps in ACTA may actually be filled by the TRIPS Agreement. That these gaps always seem to be those that establish safeguards or limits on rightholder action only emphasize the importance to the EU legislator of ensuring a proper reading of the two agreements together.

³ See Article 9.1 of ACTA. See also the 'Opinion of the European Academics on Anti-Counterfeiting Trade Agreement', *supra*.

⁴ See Article 13 of the IPR Enforcement Directive.

⁵ Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE_TC1-COD(2005)0127).

Nothing in ACTA requires parties to implement their obligations in ways that violate the Doha Declaration on TRIPS and Public Health. Patents are excluded from the ambit of border measures. It is all trademark infringements are covered. The application of in-transit procedures may raise concerns if EU member states extend their application to patent and trademark infringements. The permissive nature of ACTA means that guidance may be required to ensure that member states implement ACTA appropriately.

The study finds that the letter of the agreement is not incompatible with the Acquis but that there are no guarantees that its implementation will be. The Parliament may therefore wish to consider a need for a clarification of and guidance on how ACTA will be implemented especially the border and criminal enforcement measures as well as the in-transit procedures.

2. GENERAL OVERVIEW AND INTRODUCTION

2.1. Genesis of ACTA

The Anti-Counterfeiting Trade Agreement ('ACTA') was born out of the frustration of the major industrialised economies with progress on monitoring and norm-setting on the enforcement of intellectual property rights in multilateral fora.⁶ In the WTO Council for TRIPS ('TRIPS Council'), Brazil, India and China have consistently blocked the inclusion of enforcement as a permanent agenda item.⁷ At the World Intellectual Property Organisation (WIPO), enforcement issues were relegated to a purely advisory committee.⁸ ACTA can also be seen as an extension of the existing strategies of the main ACTA parties to include significant provisions on enforcement in their bilateral and regional free trade agreements (FTAs).⁹ Led by the European Union, Japan, and the United States the ACTA parties have sought to give international negotiations some forward momentum and to consolidate the intellectual property protection provisions in the network of free trade agreements signed by the various ACTA parties.

Initial intentions to negotiate such an agreement were revealed in 2005 by Japan, and later in 2006 by the US.¹⁰ Formal negotiations were launched in October 2007 and concluded after 11 rounds in October 2010 in Tokyo, Japan. The negotiating parties included: Australia, Canada, , Japan, the Republic of Korea, Morocco, New Zealand, Singapore, Switzerland, Mexico, the United States, and the European Union. The major emerging economies, China, Brazil and India appear not to have been formally invited to participate.

⁶ For more on this see: M Kaminski, 'Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)', 34 YALE J. INT'L L. 247 (2009).

⁷ Statement by delegation of the European communities and its Member States 'Minutes of Meeting Held in the Centre William Rappard on 8-9 June 2010' Council on Trade-related Aspects of Intellectual Property, IP/C/M/63, 4 October 2010.

⁸ WIPO 'Mandate of WIPO Advisory Committee on Enforcement', **WO/GA/28/7** http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=14890 (Accessed 22.04.2011)

⁹ See European Commission, Global Europe: Competing in the World, 2006. See http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (Accessed 22.04.2011).

¹⁰ T Gerhardsen, 'Japan Proposes New IP Enforcement Treaty', INTELLECTUAL PROPERTY WATCH, Nov. 15, 2005, <http://www.ip-watch.org/weblog/index.php?p=135>. (Accessed 22.04.2011)

ACTA is best characterized as a plurilateral agreement that closely mirrors the negotiations carried out in bilateral and regional FTA negotiations between the EC and its partners. In this sense, ACTA may be intended to work most similarly to WIPO agreements such as the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT). In recent bilateral and regional free trade agreements concluded by the EU, the parties agreed to comply¹¹ with the WCT and the WPPT¹² or specific articles therein.¹³ Used in such a fashion, the ACTA standard would be extended to become a de facto multilateral norm. The preamble makes clear that aim of ACTA is to address global trade, not just trade between the parties.¹⁴

The decision to maintain secrecy until the release of draft text in mid-2010 was to prove a significant handicap to public understanding and support for the treaty and, as outlined in Chapter 2, allowed significant misapprehensions to develop. However, the lack of disclosure of draft texts and content also meant that negotiating parties were able the scale and scope of internal disagreements amongst the parties. The result is a treaty which the negotiators have been able to describe as having little or no effect on existing laws, while setting a standard for other countries to live up to. This study assesses whether the treaty truly lives up to this description or whether ACTA means changes to EU provisions that the European Parliament will need to consider.

While ACTA is nominally not intended to affect the EU *Acquis*, it will undoubtedly have an influence on the direction of the EU debate on the future of intellectual property right protection. The new criminal measures (Section 4, ACTA) will set a new floor for the debate between EU member states. The digital and internet section (Section 5, ACTA) will influence discussions on privacy, third party and ISP liability. As this study notes, however, ACTA may have an effect beyond simply changing the nature of the discussion in the EU. The findings described in the following chapters point to several areas of concern, differing in material ways from the existing EU *Acquis*, or presenting problems because of lack of clarity in the content of certain provisions. The study also assesses whether ACTA can be said to have achieved its goals of influencing third countries.

¹¹ In contrast to acceding to the treaties, which would imply taking on institutional and procedural obligations to other non-ACTA parties to the WCT and WPPT.

¹² See e.g. Article 143.1 EU-Cariforum Economic Partnership Agreement. L 289/I/ OJ. See http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf;

¹³ See Articles 10.5(c) and 10.5(d) EU-South Korea Free Trade Agreement L 90/46/ OJ See http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145180.pdf, requiring parties to comply with article 1-14 of the WCT and Articles 1-23 of the WPPT.

¹⁴ Paragraph 2, Preamble, ACTA. However, Kimberly Weatherall points to the ACTA outcome as an example of the limits of using plurilateral and bilateral negotiations as a way to set up new global standards. In particular, she points to the watering down of ambitions of the US and the EU as an example of the difficulties of attempting to turn domestic standards into international standards. See K Weatherall 'ACTA as a New Kind of International IP Law-Making' PIJIP Research Paper no. 12, 2010. American University Washington College of Law, Washington, DC.

2.2. Rationale for ACTA and the New Enforcement Agenda

There are two main rationales for ACTA; the perceived and actual increase in piracy and counterfeiting and the desire to defend Europe's comparative advantage in research intensive higher value-added production.

The first rationale is addressed in detail in chapter 4 below. The Organisation for Economic Co-operation and Development (OECD) report *The Economic Impact of Counterfeiting*,¹⁵ outlines the costs that counterfeiting and piracy for the economy, rights-holders, consumers and governments, identifying issues such as the financial gain for criminal networks; consumer exposure to substandard products; and lower tax revenues for governments. An increase in piracy and counterfeiting has been documented in several European and international studies. In its most recent analysis, the OECD estimated that international trade in counterfeit and pirated products amounted to \$200 billion in 2005¹⁶ (excluding domestically produced goods and digital products distributed through the internet.) The need for a coordinated response to what is a global problem involving trade across borders has become increasingly urgent for the EU and its industrialized country partners who perceive this, rightly, as also a competitiveness issue with respect to emerging economies.

The second rationale for ACTA is to defend the EU's comparative advantage in research and innovation intensive activities in the face of the challenge posed by emerging economies. Even as labour intensive manufacturing and commodity extraction and processing moved to the new emerging economies and other developing countries, Europe maintained a significant edge in knowledge intensive industries. However, much as Japan and South Korea were able to do in the early 1980's, the new emerging economies are beginning to shift their economies up the value chain, competing, both fairly and unfairly, with Europe's innovative capacities. This presents a threat to the sustainability of the present European model of technology-driven export-led growth. Acknowledging this perceived threat to competitiveness, the EU established first the Lisbon Strategy in 2000¹⁷ and then Europe 2020¹⁸ in 2010, focusing on the increasing need to create new jobs to replace those that have been lost during the financial crisis. Intellectual property remains an important element in enabling innovation and ensuring the EU's ability to compete in the global economy. EU growth and jobs are hampered when ideas, brands and products are counterfeited and pirated.

An export led innovation growth path therefore requires protection of the intellectual property rights of European businesses when trading in foreign countries. The Global Europe strategy¹⁹, which is spearheaded by the European Commission, focuses on the need to strengthen

¹⁵ OECD, *The Economic Impact of Counterfeiting and Piracy*, 2008. See http://www.oecd.org/document/4/0,3746,en_2649_34173_40876868_1_1_1_1,00.html (Accessed 22.04.2011).

¹⁶ OECD, *The Economic Impact of Counterfeiting and Piracy*, 2008. See http://www.oecd.org/document/4/0,3746,en_2649_34173_40876868_1_1_1_1,00.html (Accessed 22.04.2011).

¹⁷ European Commission, Lisbon Strategy for Growth and Jobs. See http://ec.europa.eu/archives/growthandjobs_2009/ (Accessed 22.04.2011).

¹⁸ European Commission, Europe2020. See http://ec.europa.eu/europe2020/index_en.htm (Accessed 22.04.2011).

¹⁹ European Commission, *Global Europe: Competing in the World*, 2006. See http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (Accessed 22.04.2011).

intellectual property rights in order to ensure a higher value of market access for European businesses. In particular, the Global Europe strategy argues that the biggest challenge is the enforcement of existing commitments on protection and enforcement in emerging economies. Thus the primary focus for the strategy has been on establishing standards that third countries would be asked to meet, either formally through joining ACTA, or as part of bilateral processes.

2.3. The Approach taken by the Study

The purpose of this study is to provide an objective assessment of the likely impact of ACTA and in particular its compatibility with the EU *acquis* and the EU's international obligations. Within the limitations of the terms of reference and the short time frame, the authors have examined the legal and economic implications of ACTA for the European Union, and placed these in the broader context of international processes and debates.

Chapter 2 provides an overview of the debates surrounding ACTA in the European Parliament, in other ACTA parties and in third countries.

Chapter 3 provides a legal assessment of ACTA's conformity with the EU *Acquis*, and with the TRIPS Agreement, especially the Doha Declaration on TRIPS and Public Health.

Chapter 4 provides an analysis of the European innovative framework, and analyses the influence and role of ACTA within that framework. In particular, the chapter evaluates the other necessary elements of European action to make ACTA effective as a tool for Europe's future growth and development.

Chapter 5 provides a detailed examination of ACTA's provisions, providing an article by article analysis of the implications of the standards set by ACTA. This chapter is quite extensive and provides a basis for the sectoral examinations of civil liberties, access to medicines and geographical indications in Chapter 6.

Finally, Chapter 7 contains a set of recommendations for consideration by the INTA Committee and the European Parliament based on the findings of Chapters 3 through 6. In addition to specific recommendations, the chapter briefly evaluates scenarios related to the various options of conditional consent, postponement and rejection of ACTA.

As it is a new agreement, scholarly work analyzing the final text of ACTA is scarce. This study bases its analysis on the Final December 3, 2010 text provided on the website of European Commission - DG Trade.²⁰ There is a significant body of work covering the period of negotiations, but most of this was based on earlier leaked texts and is no longer relevant for any assessment of the conformity of ACTA with the EU *Acquis* or the EU's international obligations. Nevertheless, these earlier studies provide useful historical context and analysis. Most of the studies are of US origin with relatively little emanating from Europe. The same is also true, although somewhat less so, for contributions from business and NGO advocacy sources.

²⁰ <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/>
(Accessed 22.04.2011).

One European paper is of particular significance. This is the Opinion of European Academics on the Anti-Counterfeiting Agreement of February 2011²¹, which was coordinated by a consortium including key authorities on European intellectual property law with a broad spectrum of views on intellectual property ranging from strong supporters of broad intellectual property rights to strong supporters of flexibility and limitations to intellectual property. The Opinion has already been taken up by many opponents of ACTA in Europe²² and has already prompted a response from the EU Commission.²³ This study refers quite often to the Opinion, and notes where it agrees and disagrees with the analysis provided by the European Academics. The authors hope that this provides an additional analytical overlay that clarifies some of the issues that European parliamentarians will have to consider and that have been raised by the Opinion.

3. DEBATES AND PERCEPTIONS OF ACTA

This chapter assesses the debate on and perceptions of ACTA in the EU and in third countries. It is meant to set the stage for the more detailed legal assessment in Chapter 3, and the overview of ACTA provisions in Chapter 5. The concerns surrounding the nature and scope of the negotiations are described as well as the perceptions of third countries and other ACTA parties.

3.1. The Debate on ACTA in the European Parliament and in National Parliaments of the EU

The members of the European Parliament (“the Parliament”) have participated extensively in the debate on ACTA, especially regarding the issue of transparency. It is not the place of this study to present information on European parliamentarians’ own debates on ACTA. However, it may be appropriate to point to the range of questions raised by parliamentarians so that when those issues are addressed in later chapters, the context is understood. There are several categories of concerns raised by European parliamentarians: transparency; digital and internet enforcement; access to medicines; privacy and fundamental freedoms. These are also concerns reflected in the terms of reference for this study.

With respect to transparency issues, MEPs raised issues regarding:

- How expeditiously the Commission would make all negotiating documents public;²⁴
- Whether there was access to the ACTA negotiating documents by the Chairperson and Coordinators of the responsible INTA committee;²⁵
- Why a secret venue was chosen rather than a more transparent multilateral venue such as WIPO;²⁶

²¹ “Opinion of European Academics on the Anti-Counterfeiting Trade Agreement”, February, 2011 Available at: http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf (Accessed 22.04.2011)

²² See Foundation for a Free Information Infrastructure blog at <http://acta.ffii.org/wordpress/?p=176>

²³ European Commission “Commission Services Working Paper” 27 April 2011. Available at: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (Accessed 9.05.2011)

²⁴ Written Question E-2079/10 by Morten Messerschmidt (EFD) to the Commission.

²⁵ Written Question E-0147/10 by Alexander Alvaro (ALDE) to the Commission.

- An apparent mismatch between access to ACTA documents by industry lobbying organisations and lack of access by parliamentarians and public interest organisations.²⁷

On fundamental rights, MEPs have been concerned to

- ensure that ACTA does not impair freedom of expression or the right to privacy.²⁸

On access to medicines, MEPs have questioned:

- The lack of legally binding references to the Doha Declaration on TRIPS and Public Health,²⁹
- Whether ACTA would contain sufficient safeguards with respect to access to medicines;³⁰

On digital and internet issues MEPs have asked:

- Whether ISP intermediary liability could impair consumers fundamental rights;³¹ and
- The extent to which a “three strikes” or “graduated response” system would be required by ACTA?³²

In addition, MEPs have raised concerns regarding the possibility of EU citizens being subject to search of their personal luggage and electronic media tools such as MP3 players at the border.³³ Underlying this was a demand that ACTA not go beyond the existing EU *Acquis*, and not prejudge ongoing debates on key issues within the EU.³⁴

MEPs from all political groupings in the Parliament were also concerned to ensure that the Parliament had the information and ability to properly exercise its competences with regard to the negotiations and EU legislation.³⁵

²⁶ Written Question E-0147/10 by Alexander Alvaro (ALDE) to the Commission.

²⁷ Written Question E-1391/10 by Andreas Mölzer (NI) to the Commission.

²⁸ Written Question E-2079/10 by Morten Messerschmidt (EFD) to the Commission.

²⁹ Written Question E-4286/10 to the Commission: Yannick Jadot (Verts/ALE), Carl Schlyter (Verts/ALE), Christian Engström (Verts/ALE), Sandrine Bélier (Verts/ALE), Karima Delli (Verts/ALE) and Oriol Junqueras Vies (Verts/ALE).

³⁰ Written Question E-4292/10 to the Commission: Yannick Jadot (Verts/ALE), Carl Schlyter (Verts/ALE), Sandrine Bélier (Verts/ALE), Christian Engström (Verts/ALE), Karima Delli (Verts/ALE) and Oriol Junqueras Vies (Verts/ALE)

³¹ Written Question E-2079/10 by Morten Messerschmidt (EFD) to the Commission

³² Written Question E-0011/10 by Ivo Belet (PPE) to the Commission; Written Question E-0147/10 by Alexander Alvaro (ALDE) to the Commission

³³ Written Question E-1267/10 by Jeanine Hennis-Plasschaert (ALDE) to the Commission

³⁴ See e.g. Statement by Alexander Alvaro (ALDE) at ‘Debate on the oral question to the Commission’ by Carl Schlyter, on behalf of the Verts/ALE Group, Daniel Caspary, on behalf of the PPE Group, Kader Arif, on behalf of the S&D Group, Niccolò Rinaldi, on behalf of the ALDE Group, Helmut Scholz, on behalf of the GUE/NGL Group, and Syed Kamall, on behalf of the ECR Group, on transparency and the state of play of the ACTA negotiations (Anti-Counterfeiting Trade Agreement) ([O-0026/2010](#) - B7-0020/2010)

³⁵ See e.g. Written Question P-0683/10 by Françoise Castex (S&D) to the Commission; ORAL QUESTION WITH DEBATE O-0026/10 pursuant to Rule 115 of the Rules of Procedure by Carl Schlyter, on behalf of the Verts/ALE Group, Daniel Caspary, on behalf of the PPE Group, Kader Arif, on behalf of the S&D Group, Niccolò Rinaldi, on behalf of the ALDE Group, Helmut Scholz, on behalf of the GUE/NGL Group, Syed Kamall, on behalf of the ECR Group to the Commission.

3.2. Public Perceptions of ACTA

This part of the study outlines the public perception and reception of ACTA in the popular press and scientific media. The way in which ACTA has been perceived by the general public and reasonably informed intellectual property specialists alike, is determined to a large extent by the coverage in the media that can be characterised as veering from the critical to the sensationalist. On the one hand then, the response has been suspicious and negative. The lack of transparency and any direct accountability to legislatures fed this sense of suspicion. The secret nature of negotiations by the ACTA parties was under-pinned by seemingly absurd justifications such as that the text of the agreement was confidential in order to safeguard national-security.³⁶ Leaked documents of purported versions of the agreement appeared time and time again on the now infamous WikiLeaks website from as early as 2008, feeding the sense of conspiracy around the negotiations.³⁷

The controversial nature of the negotiations leading up to ACTA continues to raise issues of transparency and accountability among the public in Europe,³⁸ Mexico³⁹ and the USA. The ACTA negotiating process has been termed '[A] new kind of international IP lawmaking',⁴⁰ where the emphasis placed by ACTA on finding agreement on high standards of intellectual property enforcement has overshadowed finding agreement on appropriate exceptions and limitations. On the other hand ACTA has been presented as merely a restatement of best practice in IP protection by the OECD parties to the negotiations. These parties have actively encouraged the perception of ACTA as codifying existing practice. This approach is exemplified by the US Administration, which argues it is sufficient to implement ACTA by means of an Executive Order.⁴¹ Public comments solicited by the USTR suggests that this argument has not been convincing among either the public or the US Congress.⁴² A Congressional Research Service study of ACTA and its legality that was undertaken for the US Senate and shared with the USTR is not public, feeding misgivings about the approach taken by the US administration.. A request for access by the NGO Knowledge Ecology International (KEI) to this study commissioned by Senator Ron Wyden under the Freedom of Information Act has been denied as recently as March

³⁶ D McCullagh 'Copyright Treaty is Classified for National Security', CNET NEWS, available online at http://news.cnet.com/8301-13578_3-10195547-38.htm (last visited on 25-03-2011).

³⁷ All leaked texts and related comments can conveniently be found online at <http://keionline.org/acta> (Accessed 22.04.2011).

³⁸ See 'Lawmakers call for halt to ACTA deal', 5 October 2010, available online at <http://www.euractiv.com/en/infosociety/lawmakers-call-halt-acta-deal-news-498442>

³⁹ With Mexico even threatening to withdraw from the negotiations. See the resolution passed by the Mexican Senate of 5 October 2010, available online at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=5264&lg=61> (Accessed 22.04.2011).

⁴⁰ K Weatherall 'ACTA as a New Kind of International IP Law-Making', 09 January 2010, PIJIP Research Paper no. 12 American University Washington College of Law, DC.

⁴¹ J Goldsmith and L Lessig 'Anti-counterfeiting Agreement Raises Constitutional Concerns', Washington Post, 26 March, 2010.

⁴² Comment to ACTA could be submitted until 15 February 2011 at www.regulations.gov, docket number USTR-2010-0014.

2011.⁴³ Thus, ACTA continues to grab headlines in the US even as negotiations between the governments of Brunei, Chile, New Zealand, Singapore, Australia, Malaysia, Peru, Vietnam and the United States on the Trans-Pacific Partnership Agreement (TPP) also look set to press for similar if not stronger provisions on IP rights.⁴⁴ The fact that the US is reportedly increasing its demands, most notably in the field of copyright, in relation to the level of intellectual property protection in the TPP, as compared to ACTA, gives credence to the perception, in European, and third country publics, that ACTA that the general drive for protection of intellectual property rights is ever upward.⁴⁵ The perception is that ACTA and its progeny will affect relations between third-country trading partners, and lead to a diminishing role of the World Trade Organisation in the multilateral trading system.⁴⁶

3.3. The impact of the ACTA on third Countries

A significant weakness of ACTA is that it does not include any major emerging economy countries. Outside of Europe and the US, the only other negotiating parties were: Australia, Canada, Japan, Morocco, New Zealand, Mexico, Singapore, and South Korea. So ACTA does not include the major sources of counterfeit and pirated goods.⁴⁷ While not harmonized, enforcement standards for traditional categories of IP have been quite effective in providing protection for EU rightholders, in the US, Australia, Japan and Korea, the major non-EU OECD participants in the ACTA. The non-OECD partners in the ACTA, such as Morocco and Singapore, have FTAs with either the US that contain extensive provisions on Enforcement. There does not therefore appear to be any immediate benefit from ACTA for EU citizens.

ACTA does not include the emerging market countries that are perceived by European and US stakeholders to be the main sources of counterfeit products. It is not clear what incentive such emerging markets would have to accede to ACTA. In a single issue negotiation such as ACTA they would not gain any further access or guarantees in other sectors and would in any case, benefit from the existing legal provisions in ACTA members. Unlike for goods, there is no regional or FTA exception (GATT Article XXIV) in the TRIPS Agreement. Therefore, ACTA Parties

⁴³ See M Masnick 'USTR Refuses To Release Congressional Research Service Study On Legality Of ACTA', TechDirt 28-03-2011, available online at <http://www.techdirt.com/articles/20110325/04480513628/ustr-refuses-to-release-congressional-research-service-study-legality-acta.shtml> (Accessed 22.04.2011).

⁴⁴ M Geist 'U.S. Intellectual Property Demands for TPP Leak: Everything it Wanted in ACTA But Didn't Get', Michael Geist Blog, 11 March, 2011, available online at <http://www.michaelgeist.ca/content/view/5686/125/> (Accessed 22.04.2011) see similarly N Anderson, 'Son of ACTA: meet the next secret copyright treaty', Ars Technica, 11 March, 2011, available online at http://arstechnica.com/tech-policy/news/2011/03/son-of-acta-meet-the-next-secret-copyright-treaty.ars?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=rss (Accessed 22.04.2011).

⁴⁵ S Sell 'The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: the State of Play', IQsensato Occasional Papers No.1, 9 June, 2008 there, available online at http://www.iqsensato.org/wp-content/uploads/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf (Accessed 22.04.2011); see also D Gervais, 'The Changing Landscape of International Intellectual Property', in Heath and Kamperman Sanders (eds.), *Intellectual Property and Free Trade Agreements* (2007, Hart Publishing), p49.

⁴⁶ See R Kampf 'TRIPS and FTAs: A World of Preferential or Detrimental Relations?', in Heath and Kamperman Sanders (eds.), *Intellectual Property and Free Trade Agreements* (2007, Hart Publishing), p87.

⁴⁷ See K Weatherall, 'ACTA as a New Kind of International IP Law-Making'. PIJIP Research Paper no. 12. American University Washington College of Law, Washington, DC. p15 citing WORLD CUSTOMS ORGANIZATION, CUSTOMS AND IPR REPORT 2008, p9.

cannot discriminate against non-ACTA WTO parties in their implementation of their IP obligations unless they can clearly describe those provisions as unequivocally TRIP-plus obligations that are not covered by the national treatment and MFN clauses in TRIPS Articles 3 and 4. This would however be very difficult as those articles apply to protection of intellectual property subject matter covered by the agreement. Non-ACTA parties would therefore already benefit from the enforcement that ACTA parties would be obliged to provide for their citizens.

The most powerful tool for addressing activity in third countries will be coordinated and harmonized action at the border, especially with respect to goods at the border. This is especially true because the law for determining whether there is sufficient evidence of infringement is the law of the applying country (Article 17.1 ACTA) in which the goods are entering or passing through. However, the most powerful tool, that of applying measures to goods in transit is only a permissive obligation in that parties may apply their procedures to goods in transit but are not required to.⁴⁸ The permissive nature of the article weakens the power of the ACTA to police goods produced in non-ACTA countries, passing on to other non-ACTA countries. Goods passing through to ACTA countries will be subject to information sharing provisions in Article 29(b) ACTA. However, that article this is also only a permissive obligation and not mandatory. Nevertheless, ACTA may play a role in restricting the trade in such goods from third countries into ACTA territories.

More generally, ACTA envisages capacity building and technical assistance to prospective parties (Article 35.1 and 35.2). The paucity of effective formal mechanisms for engagement with third parties does not bode well for the future global effectiveness and relevance of the ACTA Agreement. Unless the ACTA is incorporated as a requirement for third parties to accede to in bilateral and regional FTAs, it risks become one of a series of irrelevant international attempts at negotiating standards outside the multilateral framework of WIPO, the WTO and other institutions. Weatherall expresses some scepticism, with which this study agrees, regarding the likelihood of such incorporation.⁴⁹ The very fact that ACTA standards are generally not as strong or as extensive as the standards that both the US and the EU have been pushing in their bilateral FTAs creates an atmosphere where other parties are likely to push for ACTA standards as a starting point from which they can seek to have their own standards and need for flexibilities accommodated. This may in fact harm the effectiveness of including enforcement standards in bilateral FTAs by providing an alternative and less stringent standard for EU and US bilateral partners.

In addition, the lack of any secretariat or permanent institutional mechanism leaves implementation and further development of the ACTA to bilateral consultations, which, in the tradition of the ACTA negotiations, will remain confidential. In contrast, deliberations of the TRIPS Council are not confidential and discussions are reported in minutes of the meetings as well as in annual reports.⁵⁰ We can also receive reports of negotiations for special sessions, such

⁴⁸ Article 16.2 ACTA

⁴⁹ K Weatherall 'ACTA as a New Kind of International IP Law-Making' PIJIP Research Paper no. 12, 2010. American University Washington College of Law, Washington, DC at 27.

⁵⁰ Available at: http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm (Accessed 22.04.2011).

as negotiations on a multilateral register for geographical indications.⁵¹ At WIPO, all discussions and statements made in formal sessions of the various standing committees and the General Assemblies are publicly available and reported after every meeting.⁵² The generation and existence of such reports are crucial to the determination of the actual legal content of provisions in negotiated agreements as such public records create *travaux préparatoires*, used as a supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties (VCLT), or as a basis for understanding subsequent practice of parties that gives particular meaning to terms used in an agreement. Of course, there is precedent for confidentiality in the negotiation of bilateral and regional free trade agreements, set by the US and the EU in their negotiations with their partners. The US has required partners to maintain secrecy of negotiating texts until negotiations were concluded and the EU has followed the same pattern in some of its negotiations.⁵³ However, such secrecy came under severe criticism during the ACTA process⁵⁴ during which parties were eventually pressured to release a publicly available text in April 2010.⁵⁵

The perception of ACTA by third countries, especially the major emerging economies, will have a significant impact on its stated aim of one day including them within its ambit. The process of negotiating ACTA has clearly proved an impediment to the treaty itself being viewed favourably by third countries. As far back as the October 2009 session of the TRIPS Council, the Indian delegation noted, in the context of a discussion on seizures of medicines in transit, that “the ACTA agreement was being negotiated in secrecy and with the exclusion of a vast majority of countries, including developing countries and LDCs.”⁵⁶ In fact, the developments in ACTA became a part of the regular discussion at the TRIPS Council, in conjunction with the discussion on seizures of medicines in transit by European countries. After years of insisting that the TRIPS Council had no mandate to discuss enforcement issues, India, China and Brazil found themselves forced to put the issue on the agenda. In the June 2010 meeting, China and other developing countries commented on the recently disclosed drafts of ACTA.⁵⁷ Supported by Brazil and India, China raised objections to both the principle and the contents of ACTA as they perceived it, arguing that it may be contrary to the letter and the spirit of the TRIPS Agreement and the Doha Declaration on TRIPS and Public Health. At the most recent TRIPS Council meeting in October

⁵¹ Available at: http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm (Accessed 22.04.2011).

⁵² See e.g. WIPO ‘Draft report of the Fifteenth session of the Standing Committee on Patents’, SCP /15/6 Prov.1 Available at: http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_6_prov_1.pdf.

⁵³ ICTSD ‘EU Sued Over Secrecy Surrounding FTA Talks with India’ Bridges Weekly, Volume 15, No. 5, February 18, 2011. Available at: <http://ictsd.org/i/news/bridgesweekly/101086/> (Accessed 22.04.2011).

⁵⁴ See M Geist ‘ACTA Guide, Part Three: Transparency and ACTA Secrecy’ Available at: <http://www.michaelgeist.ca/content/view/4737/125/> (Accessed 22.04.2011). See also: DG Trade Q&A on ACTA. Available at: http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142040.pdf (Accessed 22.04.2011).

⁵⁵ http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf (Accessed 22.04.2011).

⁵⁶ ‘Minutes of Meeting Held In The Centre William Rappard on 27-28 October and 6 November 2009’ Council on Trade-related Aspects of Intellectual Property, IP/C/M/61, 12 February 2010, para. 264.

⁵⁷ ‘Minutes of Meeting Held in the Centre William Rappard on 8-9 June 2010’ Council on Trade-related Aspects of Intellectual Property, IP/C/M/63, 4 October 2010, para. 252.

2010⁵⁸, further concerns were raised by the major developing countries. India expressed concern that ACTA completely by-passed existing multilateral processes⁵⁹ and went on to elaborate further concerns regarding the scope of in-transit procedures, injunctions, and the apparent re-interpretation of the meaning of the term 'commercial scale' as interpreted by the recent China IPRs WTO case.⁶⁰ Both India and Brazil expressed the sense that negotiations carried out with such a lack of transparency created significant problems for multilateral processes.⁶¹ Other countries suggested that the ACTA negotiations undermined the balance achieved within the TRIPS Agreement and impacted negatively on ongoing multilateral negotiations on IP.⁶² What the debate and discussion at the TRIPS Council shows is that there is not simply a lack of interest in the ACTA on the part of significant developing countries, but that there is active opposition to the perceived goals and the standards that ACTA aimed to achieve. This may present an insurmountable obstacle to their participation in ACTA, or in ACTA-related processes.

3.4. Issues with Ratification of ACTA in the EU and other ACTA parties

Where it comes to questions on ratification of ACTA, the most notable issue is that the status of ACTA in the United States of America is not that of an international treaty, but that of a 'sole executive agreement'. This leads to the situation whereby the US executive, the president, claims to be able to bind the U.S., without constitutional authority, for which congressional consent is required. Many legal scholars in the United States question whether ACTA can indeed stand as a sole executive agreement, or whether the scope and nature of ACTA, especially where it would affect domestic legislation it would render it unconstitutional if it does not receive congressional consent either *ex post* or in ACTA's current status *ex ante*.⁶³

Academics and legislators have taken issue with the statement by the Obama administration that ACTA is a 'sole executive agreement' that need not be ratified by the US Congress under the normal treaty ratification process. That means there will be no implementing legislation or changes to US law.⁶⁴ Authors such as Flynn argue that the US may be bound as a matter of international law while not having any implementing legislation, effectively creating a situation where the US is in immediate and continuing violation of its international obligations. This is, of course, premised on the idea that ACTA is not contiguous with US legislation and will in fact require changes to US law to be made effective. The apparent lack of intent to seek

⁵⁸ 'Minutes of Meeting Held in the Centre William Rappard on 26-27 October 2010' Council on Trade-related Aspects of Intellectual Property, IP/C/M/64, 17 February 2011.

⁵⁹ 'Minutes of Meeting Held in the Centre William Rappard on 26-27 October 2010' Council on Trade-related Aspects of Intellectual Property, IP/C/M/64, 17 February 2011, para. 444.

⁶⁰ China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs), WT/DS362/R, 09/0240, 26/01/2009.

⁶¹ 'Minutes of Meeting Held in the Centre William Rappard on 26-27 October 2010' Council on Trade-related Aspects of Intellectual Property, IP/C/M/64, 17 February 2011, para. 451.

⁶² 'Minutes of Meeting Held in the Centre William Rappard on 26-27 October 2010' Council on Trade-related Aspects of Intellectual Property, IP/C/M/64, 17 February 2011, para 453.

⁶³ See e.g. S Flynn 'ACTA's Constitutional Problem: The Treaty That Is Not a Treaty (Or An Executive Agreement)' PIJIP Research Paper no. 19, 2011. American University Washington College of Law, Washington, D.C.

⁶⁴ S Flynn 'ACTA's Constitutional Problem: The Treaty That Is Not a Treaty (Or An Executive Agreement)' PIJIP Research Paper no. 19, 2011. American University Washington College of Law, Washington, D.C.

congressional approval and thus actually implement the treaty in US law begs the question of what, if anything, the EU gained from the US. There are serious concerns regarding whether ACTA will have any effect under US law and thus be able to be treated as a treaty under international law.⁶⁵ On what subject will the EU hold bilateral consultations with the US regarding its implementation of ACTA if there is no implementing legislation that authorises action by US administrative and regulatory agencies?

The exact nature and status of ACTA also seems to be unclear in the Netherlands. Vice-premier and Minister for Economic Affairs, Agriculture and Innovation, Maxime Verhagen, in reply to a question on the effects of ACTA on Dutch law by MP Braakhuis (GroenLinks), stated: 'There has never been any question of incorporating ACTA in the Netherlands. ACTA does not have supremacy over European or national law.'⁶⁶ Although this discussion took place in the context of 'three-strikes and you're out'-legislation to combat downloading, the statement is remarkable in the sense that the Minister apparently does not consider there to be any obligations deriving directly from ACTA despite the fact that the section on criminal measures will have to be ratified by national parliaments. How this then sits with the fact that ACTA may have an impact on European and national law after all, remains unclear.

Parliamentarians in the German Bundestag have received a somewhat similar answer from the Bundesregierung on 8 April 2010. The Bundesregierung indicated that its objective in relation to ACTA was to prevent any change to the current legal framework in Germany.⁶⁷

The UK Parliament has been most concerned about the secret nature of negotiations, asking also that domestic legislation, the Digital Economy Bill, not be superseded by ACTA.⁶⁸ In the French Parliament similar concerns were raised.⁶⁹

There has been little discussion of what may occur if a significant number of European parliaments refuse to ratify the criminal measures of ACTA while the European Parliament ratifies the rest of the Agreement. There has been little discussion of the separability of these provisions from the rest of the agreement if necessary. Given the low threshold for ratifications in ACTA Article 40.6, the treaty would not have trouble entering into force under such situations, but there would be significant damage to the harmonizing effect that ACTA would have on member states criminal enforcement of intellectual property.

In conclusion, it would seem that there is considerable concern that ACTA may change domestic legislation in EU Member states, but that national governments have indicated that ACTA will not affect the current legal framework, or even that ACTA has no supremacy over European or national law. As for the United States of America, the status of ACTA and the obligations ensuing from it, are far from clear, until there is a clear indications as to whether it is an 'executive

⁶⁵ S Flynn 'ACTA's Constitutional Problem: The Treaty That Is Not a Treaty (Or An Executive Agreement)' PIJIP Research Paper no. 19, 2011. American University Washington College of Law, Washington, D.C., p4.

⁶⁶ Dutch Parliament, 23 December 2010, Kst-21501-33-305, of p. 19: 'Er is echter nooit sprake van geweest om ACTA in Nederland te incorporeren. ACTA gaat namelijk niet boven Europese of nationale wetgeving.'

⁶⁷ German Parliament, 8 April 2010, Drucksache 17/1322, p. 7, in answer to questions no. 13 and 14.

⁶⁸ UK House of Commons, 25 January 2010, see <http://www.parliament.uk/edm/2009-10/700>, (Accessed 22.04.2011).

⁶⁹ French Parliament, Question No 76546 of 22 December 2009.

agreement' or an international treaty subject to congressional approval. The confusion and secrecy surrounding the negotiations has clearly led to problems in the nature and scope of ratification processes in the EU and the US. Significant uncertainty remains regarding the role that national legislatures will play.

4. LEGAL ASSESSMENT OF ACTA CONFORMITY WITH TRIPS AND THE EU ACQUIS

This Chapter assesses the legal compatibility of ACTA with the TRIPS Agreement and the EU *Acquis*. It should be noted that these analyses are purely legal assessments and are not meant to be policy judgements about the desirability of maintaining compatibility with the TRIPS Agreement or the EU *Acquis*. It is however recognised that the assessment in this chapter goes to the core of the European Parliament's consensus viewpoint, as well as the EU Commission's statement, that ACTA should not require any changes to the EU *Acquis* and will not affect the obligations of the EU with respect to the TRIPS Agreement or the EU *Acquis*. If ACTA does require changes in the EU *Acquis* this would be contrary to statements by the Commission and may incline a significant number of European Parliamentarians to vote against ratification of the treaty as it stands. With that in mind, this study has been cautious not to make unduly authoritative statements regarding what are, after all, legal assessments that are subject to argumentation and are, in the final analysis, governed by the policy goals that legislators wish to achieve.

4.1. Conformity with TRIPS and the Doha Declaration on TRIPS and Public Health

Given that both the TRIPS Agreement and ACTA are aimed at member states, the question of conformity boils down to whether ACTA makes it difficult or impossible for states to implement national legislation that complies with their obligations under both treaties. This is especially important in a treaty that contains a significant number of permissive provisions allowing member states to impose higher standards or apply a broader scope than is required by the treaty. This section will first describe in general terms the nature and scope of the relationship between the two treaties and then compare the ACTA and TRIPS provisions on each element.

4.1.1. Relationship between TRIPS and ACTA

The preamble clearly states that the purpose of ACTA is to be complementary to the TRIPS Agreement⁷⁰, while ACTA Article 1.1 on relations with other agreements stipulates that "nothing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights". There is clearly an aim to remain tied to the primary international treaty on enforcement (i.e the TRIPs Agreement) by filling out and providing further detail on the provisions of the TRIPS Agreement. While the preamble to ACTA notes the freedom and sovereignty of parties to implement the agreement as they wish, there is also a desire to create

⁷⁰ Para 4, Preamble, ACTA

effective and appropriate measures that would set a standard for how the TRIPS Agreements provisions on enforcement should be applied.

One group of European academics⁷¹ points to several areas in which ACTA may be TRIPS-plus, such as the right of information, which may shift from a voluntary standard under Article 47 TRIPS to a mandatory standard under ACTA⁷². In particular, TRIPS Article 47 states that the right to information is limited in so far as the authority and requirement to provide information should not be out of proportion to the seriousness of the infringement. Parties may take such a test into account. Article 11 of ACTA contains no such measure.

However, the safeguards contained in the TRIPS Agreement, to the extent that they are mandatory, are in no way modified by ACTA.⁷³ ACTA Article 1 is very clear that nothing in ACTA shall allow or enable parties to derogate from their obligations under the TRIPS or any other international agreements. Thus arguments that the failure to include a provision similar to Article 56 TRIPS⁷⁴ in ACTA removes the safeguard is not accurate, as EU member states must still comply with TRIPS. However, ACTA may still restrict the use of TRIPS safeguards that are optional.

The following is a comparison of ACTA and TRIPS provisions.

4.1.2. Comparing ACTA and TRIPS Provisions

General Definitions

The definition of counterfeit trademark goods and pirated copyright goods is exactly the same as that used in the TRIPS Agreement. The agreement is also limited to the same subject matter as the TRIPS Agreement.⁷⁵

General Obligations

Article 3 ACTA and Article 41.1 TRIPS use identical language. Article 6.2 ACTA actually contains stronger language ensuring that the rights of all participants must be protected. There is general similarity of provisions in this section and nothing in ACTA can be construed to be incompatible with the equivalent TRIPS provisions.

Civil Enforcement

Injunctions –Article 8.1 ACTA expands the application on injunctions under Article 44.1 TRIPS beyond alleged infringers to include third parties. Article 8.2 is generally identical to Article 44.2

⁷¹ Section II 'Opinion of European Academics on the Anti-Counterfeiting Trade Agreement', February, 2011 Available at: http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf, (Accessed 22.04.2011).

⁷² Article 11 ACTA.

⁷³ For further support of this proposition see K Weatherall 'ACTA April 2010 - Analysis of Provisions' The Selected Works of Kimberlee G Weatherall 2010 at 36. Available at: <http://works.bepress.com/kimweatherall/20>, (Accessed 22.04.2011).

⁷⁴ This requires that member states give their authorities the power to "order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55."

⁷⁵ Article 5(h) ACTA

TRIPS, but fails to specify as Article 44.2 does that it applies to remuneration under compulsory licensing under Article 31(k) TRIPS. This difference seems negligible but it is unclear why different language was chosen, appearing to make the application of the provision broader than Article 31(k).

Damages – Where Article 9 ACTA expands the scope of the bases for calculating damages, this may be characterised as an expansion of the TRIPS minimum. Article 45.2 TRIPS may be interpreted as placing a ceiling on the extent to which an innocent infringer may be ordered to pay costs or pre-established damages. However, parties are permitted to extend payments to an innocent infringer. Article 9 ACTA appears to exclude innocent infringers from the scope of the provisions on damages, while extending the scope of damages available against knowing infringers. This is not in conflict with the TRIPS provision.

Other remedies – nothing in Article 10 ACTA is out of conformity with the TRIPS Agreement. The provision is very similar to Article 46 TRIPS, except that it provides for the carrying out of procedures at the expense of the infringer. It also does not reiterate the mandatory TRIPS safeguard that authorities must take into account the need for proportionality and the seriousness of the infringement in deciding whether or not to order the destruction of infringing goods.

Provisional measures

ACTA's articles on provisional measures are largely consistent with the TRIPS Agreement. Article 12.1 ACTA and Article 50.1 TRIPS are virtually identical. ACTA differs in that, unlike Articles 50.3 – 50.8 TRIPS, it contains no provisions safeguarding the rights of defendants in such procedures, such as strict time limits on the effect of provisional measures. Instead, ACTA extends the scope of materials that may be seized beyond just the infringing goods.

Border measures

The border measures section in the agreements is quite similar. However, ACTA expands the application of these beyond counterfeit trademark goods and pirated copyright goods (but not to patents). Article 51 TRIPS explicitly allows for such extensions, subject to the requirement that they meet the standards and safeguards in Articles 52 – 58 TRIPS.

Criminal procedures

Article 61 TRIPS permits states to provide for criminal procedures and places no limits on how stringent these may be. The provisions in ACTA remain well within the language of Article 61 TRIPS. Where there remains some controversy is the definition of “commercial scale” adopted in Article 23.1 ACTA, which would apply criminal procedures to activities undertaken for indirect economic advantage. The 2009 WTO Panel decision in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*⁷⁶ stated that the threshold for criminal enforcement covering activities on a commercial scale is set at: ‘counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a

⁷⁶ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs)*, WT/DS362/R, 09/0240, 26/01/2009.

given product in a given market'.⁷⁷ The ACTA norm of 'indirect economic or commercial advantage' focuses on the intent of the alleged counterfeiter or pirate, rather than on assessment of the adverse effects on the market, and merely seems to further elaborate the term 'wilful'. It must therefore be considered that ACTA is not in line with the WTO Panel decision.

4.1.3. Conformity with the Doha Declaration on TRIPS and Public Health

ACTA parties explicitly 'recognise' the principles of the Doha Declaration on TRIPS and Public Health ("Doha Declaration"), in the preamble. However, that recognition does not have the same operative effect as articles in the main text. The question of conformity with the Doha Declaration is also coloured by whether it is viewed as a legal instrument in its own right or simply as an interpretive statement by the WTO General Council. While that debate continues the question for the purposes of this study is whether ACTA in any way implicates the subject matter covered by the Doha Declaration on TRIPS and Public Health.

Patents, which are the primary access to medicines issue, are excluded from the coverage of border measures⁷⁸; may be excluded by a party from the coverage of civil measures⁷⁹; and may be included within criminal measures but are not required to be. Thus, an initial survey suggests that ACTA itself does not implicate access to medicines through its standards on enforcement of patents. However, the permissive nature of the provisions on civil enforcement and criminal measures mean that the manner of implementation by each Party may yet implicate the concerns raised by the Doha Declaration. However, the Doha Declaration, especially in paragraph 4, is a statement about what freedom each WTO member has to interpret the TRIPS Agreement and to use TRIPS flexibilities to address public health issues. Nothing in the Declaration actively requires WTO members to utilize those flexibilities. Thus where ACTA parties choose to implement ACTA domestically in a way that restricts access to medicines for their **own** citizens, nothing in the Doha Declaration can be relied upon to argue that the state is in violation of obligations under the Doha Declaration.

Only to the extent that action taken by a member restricts or challenges another member's ability to implement the TRIPS Agreement in way that ensures access to medicines to its citizens are the provisions in ACTA implicated. In its present form ACTA does not present such an issue. However, where an ACTA party extends its border measures to include patents and goods in-transit, there may be a legitimate argument that such interference with trade between countries where the medicines are not patented would be in contradiction to the commitments expressed in Paragraph 4 of the Doha Declaration. A WTO member could also argue that this interferes with their policy on parallel importation and that in-transit procedures applied to pharmaceutical patented goods in transit would interfere with the freedom on exhaustion

⁷⁷ China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs), WT/DS362/R, 09/0240, 26/01/2009. See also 'Opinion of European Academics on the Anti-Counterfeiting Trade Agreement', February, 2011 See http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf (Accessed 22.04.2011).

⁷⁸ Article 13 ACTA

⁷⁹ Footnote 2 ACTA

systems required by Article 6 TRIPS and Doha Declaration paragraph 5(d). This would be an issue to be addressed in implementation as ACTA does not require inclusion of patents.

Less central, but still a concern, is the manner in which border measures are applied in cases of trademark infringements beyond counterfeit trademark goods. These are only a concern to the extent that in-transit procedures are applied in cases of trademark infringements beyond the use of identical marks. This is covered more extensively in Chapter 6. The application of in-transit procedures to pharmaceutical products protected by patents or trademarks presents a significant problem that implementing states will need to be aware of. Nevertheless, ACTA **does not** require them to implement their obligations in a way that would raise any such legal concerns.

Given the uncertainty concerning implementation the Parliament may wish to consider the provision of guidance to EU member states on how to implement ACTA obligations on border measures in a way that remains within the letter and spirit of the Doha Declaration.

4.2. Conformity with EU Law: Assessment of Potentially Conflicting clauses with EU legislation

4.2.1. ACTA and EU Law: an Overview

The provisions of ACTA fall within the sphere of a number of sensitive areas of EU law, including fundamental rights recognised in the EU, such as the right to fair and due process, the right of information, freedom of speech, the protection of privacy and data protection rules. It should also be recalled that enforcement of intellectual property rights has already been harmonised in the EU, except for the area of criminal enforcement.

This study has assessed the compatibility of ACTA with EU law against the following:

- The EU Treaties (and, in particular, the Treaty on the European Union and the Treaty on the Functioning of the European Union);⁸⁰
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter, “the IPR Enforcement Directive”);⁸¹
- Council Regulation No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (hereinafter, “the IPR Customs Regulation”);⁸²

⁸⁰ OJ C 83, 30.3.2010.

⁸¹ OJ L 7, 13.1.2004.

⁸² OJ L 196, 2.8.2003.

- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter, “the Information Society Directive”);⁸³ and
- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regards to the processing of personal data and on the free movement of such data.⁸⁴

In light of the assessment conducted, it can be argued that the provisions of ACTA appear to be, in most cases, in line with the EU *acquis communautaire*. However, in some cases, ACTA is arguably more ambitious than EU law, providing a degree of protection that appears to go beyond the limits established in EU law. The sections below provide a more detailed analysis.

4.2.2. ACTA’s Provisions on the Legal Framework for Enforcement and EU Law

The section follows the structure of ACTA and focuses on the compatibility of ACTA’s provisions on civil enforcement, border protection measures, criminal enforcement and the enforcement of intellectual property rights on the digital environment with the EU *acquis*.

4.2.3. ACTA’s Provisions on Civil Enforcement (Articles 7-12 of ACTA)

The existence of potentially conflicting clauses has been identified in relation to ACTA’s provisions on injunctions, damages, other remedies and provisional measures. The relevant EU framework is provided by the IPR Enforcement Directive.⁸⁵

Injunctions

ACTA requires Parties to provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, their judicial authorities be empowered to issue an injunction against the infringer aimed at prohibiting the continuation of the infringement and, *inter alia*, an order directed to the infringer or (where appropriate) a third party to prevent infringing goods from entering the channels of commerce.⁸⁶ It is noted that the IPR Enforcement Directive provides for similar language.⁸⁷ However, as an alternative measure to the injunction, the IPR Enforcement Directive allows judicial authorities, at the request of the person liable to be subject

⁸³ OJ L 167, 22.6.2001.

⁸⁴ OJ L 281, 23.11.1995.

⁸⁵ It must be mentioned that, on 22 December 2010, the European Commission transmitted to the European Parliament, the Council and the Economic and Social Committee a report on the enforcement of intellectual property rights. A public consultation on this report is currently taking place with the view of prompting the views of other European Institutions, the EU Member States and private stakeholders on the findings reflected in the report on the application of the IPR Enforcement Directive. The consultation is aimed at verifying the information provided in the report and at identifying additional issues that should be addressed in the context of a possible review of this legal instrument. This assessment is, therefore, without prejudice to different considerations that may arise pursuant to the outcome of the review of the IPR Enforcement Directive.

⁸⁶ See Article 8.1 ACTA.

⁸⁷ See Article 11 of the IPR Enforcement Directive.

to the injunction and under specific circumstances, to order pecuniary compensation.⁸⁸ ACTA does not explicitly provide for the possibility of applying pecuniary compensation as an alternative to injunction.⁸⁹ Nothing in ACTA forbids the provision of authority for judicial authorities to order pecuniary compensation as an alternative.⁹⁰ But recourse to this option may be called into question by other ACTA parties should this provision of ACTA be enacted in its present form.⁹¹

Damages

As compared to the provisions of the IPR Enforcement Directive, ACTA appears to establish different criteria for the quantification of the compensatory damages. In particular, ACTA requires Parties to empower, in civil judicial proceedings, their authorities to order:

- Compensatory damages (*i.e.*, damages intended to compensate for the injury that the right holder suffered by cause of the infringement);⁹² and
- Damages equivalent to the infringers' profits from the violations. ACTA requires that these damages be foreseen at least in cases of copyright or related rights infringements and trademark counterfeiting;⁹³

In addition, with respect to, at least, infringement of copyright or related rights protecting works, phonograms and performances and trademark counterfeiting, ACTA requires Parties to provide for (i) pre-established damages; or (ii) presumption-based damages; or (iii) additional damages for violations of copyright. These damages are to be ordered as an alternative to the compensatory damages and damages equivalent to the infringers' profits.⁹⁴

Two of the criteria for compensatory damages (*i.e.*, the value of the infringed goods or services measured by the market price, or the suggested retail price)⁹⁵ do not appear to fully match the criterion of "*appropriateness of the damage to the actual prejudice suffered*" envisaged in the IPR Enforcement Directive.⁹⁶ As such, where member states properly apply this criterion they may potentially be in violation of the ACTA requirement to have their judges consider such, non-traditional forms of measuring damages.⁹⁷

⁸⁸ See Article 12 of the IPR Enforcement Directive.

⁸⁹ See the 'Opinion of European Academics on Anti-Counterfeiting Trade Agreement', available at: http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf (Accessed 22.04.2011).

⁹⁰ This is a point also made by the EU Commission. See European Commission "Commission Services Working Paper" 27 April 2011. Available at: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (Accessed 9.05.2011), p6.

⁹¹ *Ibid.*

⁹² See Article 9.1 of ACTA.

⁹³ See Article 9.2 of ACTA.

⁹⁴ See Article 9.3 and 9.4 of ACTA.

⁹⁵ See Article 9.1 of ACTA. See also the 'Opinion of the European Academics on Anti-Counterfeiting Trade Agreement', *supra*.

⁹⁶ See Article 13 of the IPR Enforcement Directive.

⁹⁷ In its response to the Opinion of the European Academics, the Commission does not directly address this point, which under the IPR Enforcement Directive is a requirement, not an option. See "Commission Services Working

Other Remedies

ACTA requires Parties to ensure that, at least with respect to pirated copyright goods and counterfeit trademark goods, judicial authorities have the power to order the destruction of infringing goods.⁹⁸ This appears to be in line with the EU *acquis*, to the extent that the destruction of infringing goods is already envisaged by the IPR Enforcement Directive for all infringements as one of the three remedies that may be invoked in addition to damages (the other two being the recall and definitive removal of the products infringing IPRs from the channels of commerce).⁹⁹ However, as the EU *acquis* provides for two other remedies, some concerns about compatibility arise. As a requirement that courts be granted a particular power, however, there does not appear to be a limitation on the EU also empowering judicial authorities to apply other remedies, to the extent that these authorities are also empowered to do as ACTA requires.

Notably, whereas ACTA requires that the judicial authorities be empowered to order the destruction of pirated copyright goods and counterfeit trademark goods without compensation, except in exceptional circumstances, the IPR Enforcement Directive is silent on the issue. This may lead to inconsistent application of EU Member States' courts with the provisions of ACTA where provision is made for compensation for (some or all of) the losses suffered by the infringer by cause of the application of the remedy.

Provisional Measures

Both the EU IPR Enforcement Directive and ACTA provide for the obligation that judicial authorities be empowered to apply provisional measures *inaudita altera parte*, (i.e., without the defendant being heard) with certain requirements.¹⁰⁰ The EU IPR Enforcement Directive requires the respect of a number of procedural safeguards when such measures are taken. These include the obligation to inform parties without delay and provision for the defendant to request a review of the decision to apply provisional measures, at which the defendant has the right to be heard. The EU IPR Enforcement Directive also requires that provisional measures be revoked if the applicant does not institute proceedings leading to a decision on the merits of the case within a reasonable period of time.¹⁰¹ ACTA provides for no such specific procedural safeguards that would apply in the event of the adoption of provisional measures *inaudita altera parte*. It does, however, in Article 6, provide that procedures enforcing the protection of intellectual property rights be applied "*in such a manner as to [...] provide for safeguards against their abuse*"

Paper" 27 April 2011. Available at: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (Accessed 9.05.2011), p7.

⁹⁸ See Article 10 of ACTA. In relation to 'materials and implements' used predominantly in the manufacture and creation of the infringing goods, ACTA requires that judicial authorities be empowered to order their destruction or disposal outside of the channels of commerce.

⁹⁹ See Article 10 of the EU IPR Enforcement Directive. Please note that, under the EU IPR Enforcement Directive, these remedies also apply to 'materials and implements' principally used in the creation or manufacture of the infringing goods.

¹⁰⁰ See Article 9.4 of the EU IPR Enforcement Directive and Article 12.2 of ACTA.

¹⁰¹ Under the EU IPR Enforcement Directive, the reasonable period of time is to be determined by the judicial authority ordering the measures where the law permits so or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

and that “procedures adopted, maintained, or applied to implement the provisions of this chapter shall be fair and equitable, and shall provide for the rights of all participants subject to such procedures to be appropriately protected”.

It is not clear, therefore, whether the lack of specific procedural safeguards in case of provisional measures *inaudita altera parte* may be inconsistent with the *acquis*. It can be argued that, to the extent that the provisions of Article 6 allow EU Member States’ authorities to maintain and apply the procedural safeguards envisaged in the EU IPR Enforcement Directive, there appears to be no inconsistency between the provisions of ACTA and the EU *acquis*.¹⁰²

4.2.4. ACTA’s Provisions on Border Measures (Articles 13-22 of ACTA)

The existence of potentially conflicting clauses has been identified mainly in relation to ACTA’s provisions on the scope of border measures. The relevant *acquis* here is provided by the IPRs Customs Regulation.

Scope of the Border Protection

ACTA appears to extend the scope of intellectual property rights subject to border protection measures beyond what is currently provided under the EU *acquis*. In particular, whereas under the IPRs Customs Regulation the type of trademark infringement triggering border measures is limited to counterfeit goods (as defined in IPR Customs Regulation Article 2.1(a)(1)), ACTA appears to extend the scope of border measures to all intellectual property rights, including other types of trademark infringements not involving use of identical marks. As it was noted,¹⁰³ this appears to result in an extension of the EU *acquis*. It may be possible to argue that Article 13 provides a way to exclude certain kinds of infringements from the application of border measures, as the Commission does,¹⁰⁴ but the difficulty will be establishing what constitutes a justifiable discrimination between types of intellectual property as required by the article. In particular, where the Commission seems to be of the view that such extension is optional under ACTA, the text of Article 13 is clear that unless ‘justified’ border measures cannot exclude all trademark infringements. In the context of the history of exceptions and exclusions allowable or justifiable under the TRIPS Agreement, these may be restricted to those that meet the criteria of Article 8.1 TRIPS, regarding public health and protection of the environment. The Commission has yet to provide what its argument would be for justifiably reducing the scope of application of border measures only to counterfeit trademark goods.

¹⁰² Please note that a different conclusion was reached in the ‘Opinion of the European Academics on Anti-Counterfeiting Trade Agreement’, *supra*.

¹⁰³ According to the ‘Opinion of the European Academics on Anti-Counterfeiting Trade Agreement’, this could also result in an inconsistency with international trade rules, in particular, those of the Declaration on TRIPS and Public Health, to the extent that it might lead to seizure of generic medicines on the basis of allegations of trademark infringements.

¹⁰⁴ “Commission Services Working Paper” 27 April 2011. Available at: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (Accessed 9.05.2011), p9.

Other

Article 19 of ACTA requires Parties to adopt and maintain procedures by which its competent authorities may determine, “*within a reasonable period of time*”, whether or not the “*suspect*” goods infringe intellectual property rights. As the IPRs Customs Regulation requires that such determination be dealt with under EU Member States’ laws, it is not evident how the EU *acquis* ensures that the determination of the intellectual property rights violation is completed “*within a reasonable period of time*”.

4.2.5. ACTA’s Provisions on Criminal Enforcement (Articles 23-26 of ACTA)

Currently there is no EU harmonisation of criminal measures for the enforcement of intellectual property rights, despite several attempts by the European Commission to include criminal procedures in the *acquis*, first in the IP enforcement Directive 2004/48,¹⁰⁵ and then in the IPRED2 proposal. European Parliament amendments passed and adopted and the criticism voiced by several non-governmental organizations,¹⁰⁶ a law society¹⁰⁷ and the Dutch parliament¹⁰⁸ led the European Commission to withdraw the IPRED2 proposal and to terminate the directive process, after the IPRED2 had failed to reach Council consensus.¹⁰⁹ Against the background of a clear lack of internal agreement, there have been questions raised about the legitimacy of the EU Presidency negotiating the ACTA provisions on criminal enforcement.¹¹⁰

In the context of the legislative procedure and the approval of the Resolution, the Parliament put forward a number of amendments to the Commission’s proposal and expressed positions which could be interpreted as being in conflict with certain provisions of ACTA on criminal enforcement (see Chapter 5). When criminal enforcement of intellectual property rights was being considered, the Parliament, in its position of 25 April 2007, clearly stated that acts ‘carried out by private users for personal and not-for-profit purposes’ were to be excluded from the scope of the Directive. This may clash with broad definition of “commercial scale” used in ACTA.¹¹¹ The Parliament also declared that ‘the fair use of a protected work, including such use

¹⁰⁵ The section on criminal enforcement was omitted from the Directive 2004/48 in order to meet the May 1, 2004 deadline.

¹⁰⁶ See the Electronic Frontier Foundation and the Foundation for a Free Information Infrastructure, <http://www.eff.org/deeplinks/archives/005174.php> and <http://press.ffii.org/Press%20releases/EU%20Commission%20proposes%20to%20criminalise%20European%20software%20industry>, (Accessed 22.04.2011).

¹⁰⁷ See the Law Society of England and Wales, August 2006, <http://www.lawsociety.org.uk/secure/file/157008/e/teamsite-deployed/documents/templatedata/Internet%20Documents/Non-government%20proposals/Documents/ipcriminalsanctions310806.pdf> (Accessed 22.04.2011).

¹⁰⁸ See M Ermert, ‘EU IP Enforcement Directive Questioned On Procedure’, Intellectual Property Watch, July 11, 2006.

¹⁰⁹ See reference COD/2005/0127 of the European Parliament’s Legislative Observatory, <http://www.europarl.europa.eu/oeil/file.jsp?id=5263692> (Accessed 22.04.2011).

¹¹⁰ See the ‘Opinion of the European Data Protection Supervisor’, OJ C 147/1, 5.6.2010, paragraph 66; see also the ‘Opinion of the European Academics on Anti-Counterfeiting Trade Agreement’, *supra*.

¹¹¹ Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE_TC1-COD(2005)0127).

by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence'. Similarly, Article 7 of the Parliament's Position required safeguards against the misuse of criminal procedures and sanctions, especially when they are employed for the enforcement of the requirements of civil law. Such safeguards are not contained in ACTA.¹¹²

The issue of the scope of criminal measures is most problematic in the field of copyright and related rights, as these cover not only economic actors, but address private individuals in equal measure. Copyright and related rights extend into the private sphere and potentially affect daily communication. It would seem that the concerns of the Parliament with respect to these issues are just as relevant today, as they were in 2007, and would need to be addressed in the context of ACTA, which is silent on this matter.

Finally, although criminal matters have entered the sphere of shared competences between the Member States and the Union with the Lisbon Treaty,¹¹³ trade agreements in this field have to fulfill the same standard as internal harmonization measures:¹¹⁴ criminal matters that are part of a trade agreement must be *essential* to ensure the effective implementation of the Union's policy in the area of intellectual property protection.¹¹⁵ Whether the criminal measures proposed under ACTA fulfill this standard of essentiality is questionable, particularly in view of the debate that has been ongoing since the IPRED2 was proposed.¹¹⁶ Several scholars¹¹⁷ and the Dutch Parliament¹¹⁸ have expressed their serious concerns whether such criminal measures, which are similar to those included in ACTA, fulfill the standard of subsidiarity.¹¹⁹ The same questions would arise in the context of the criminal measures proposed by ACTA.

¹¹² Para 7, 'Opinion of European Academics on the Anti-Counterfeiting Trade Agreement', February, 2011, para. 7. http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf (Accessed 22.04.2011)

¹¹³ See Article 4.2 (j) TFEU.

¹¹⁴ See Article 207.6 TFEU: 'The exercise of the competences conferred by this Article [to conclude international agreements] in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.'

¹¹⁵ See Article 83.2 TFEU.

¹¹⁶ See the Foundation for a Free Information Infrastructure, Copyright Criminal measures in ACTA, October 8, 2010, <http://acta.ffii.org/wordpress/?p=34> (Accessed 22.04.2011).

¹¹⁷ See Hilty, Kur and Peukert, 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights', 22.9.2006, http://www.ip.mpg.de/shared/data/pdf/directive_of_the_european_parliament_and_of_the_council_on_criminal_measures_aimed_at_ensuring_the_enforcement_of_intellectual_property_rights.pdf (Accessed 22.04.2011).

¹¹⁸ See Brief van de voorzitters van de beide kamers der Staten-Generaal aan Europees Commissaris Frattini inzake de uitkomsten van de parlementaire subsidiariteitstoets van COM(2006)168 fin, 3 juli 2006, Nr. 30 587, http://people.vrijschrift.org/~ante/ipred/NL_Frattini-nl.pdf (Accessed 22.04.2011).

¹¹⁹ See the ECJ's judgment of 13 September 2005, Commission of the European Communities v. Council of the European Union, C-176/03.

4.2.6. ACTA's Provisions on Enforcement in the Digital Environment (Article 27 of ACTA)

The obligations envisaged in ACTA on the enforcement of intellectual property rights on the digital environment appear in line with the EU *acquis* and, in particular, with the Information Society Directive and the EU's legislative framework on privacy and data protection and the freedom of expression and information. ACTA's provisions that are capable of affecting the EU *acquis* are formulated as non-binding clauses (*i.e.*, Article 27.4 and the use of the word "may" instead of "shall")¹²⁰ and, therefore, do not constitute legal obligations.

4.2.7. ACTA's Provisions on Enforcement Practices and International Cooperation

ACTA's Chapters III (on Enforcement practices) and IV (on International Cooperation) could be relevant to the EU data protection rules inasmuch as they could entail the exchange of personal data between Parties' authorities and/or private organisations. The relevant provisions in ACTA do not appear to impose on the EU and EU Member States an obligation to exchange personal data with other Parties' authorities or stakeholders.¹²¹ In addition, Article 4 of ACTA expressly states, *inter alia*, that ACTA shall not require a Party to disclose information the disclosure of which would be contrary to its law, and provides for safeguards that apply to the information shared pursuant to the provisions of the Agreement.

However, given the relatively broad formulation of ACTA's provisions on information sharing and cooperation, their real impact on EU data protection rules will most likely depend on how cooperation between Parties will be implemented. In this respect, reference may be made to the "Opinion of the European Data Protection Supervisor"¹²² advising on the safeguards that should apply to data transfers made in the context of ACTA.

4.2.8. Conclusion

In light of the assessment above, it can be argued that the provisions of ACTA appear to rest, in most cases, within the boundaries of EU law. However, in some cases, ACTA is arguably more ambitious, providing for a degree of protection that appears to go beyond the limits established in EU law. The primary area of concern is that of border measures, especially the expansion of the scope of such measures to all other forms of intellectual property, except for patents. In short EU authorities will need to carefully review the very few instances in which there may need to be

¹²⁰ See Article 27.4 of ACTA.

¹²¹ See Article 34 of ACTA, which provides that: "Without prejudice to the provisions of Article 29 (Management of Risk at Border), each Party shall endeavour to exchange with other Parties:

(a) information the Party collects under the provisions of Chapter III (Enforcement Practices), including statistical data and information on best practices;

(b) information on its legislative and regulatory measures related to the protection and enforcement of intellectual property rights; and

(c) other information as appropriate and mutually agreed". The provisions on consultation and information sharing envisaged in Article 29 are merely optional and do not bind Parties. Article 29 of ACTA.

¹²² OJ C 147/1, 5.6.2010.

a modification of EU law. The EU Commission continues to maintain that ACTA is fully in line with the EU Acquis, most recently in its response to the Opinion of European Academics on the Anti-Counterfeiting Trade Agreement'.¹²³

5. OVERALL ECONOMIC AND COMMERCIAL ASSESSMENT

5.1. Introduction

This chapter takes a closer look at the economic and commercial interests and objectives of the EU with regard to ACTA. To put the discussion into context it will first look at the complex nature of IPRs from a social welfare point of view (in a so-called closed economy) and then with respect to international trade and foreign direct investment. The chapter then looks at the impact of ACTA on the EU's ability to generate greater value-added via innovation and knowledge creation and the extent to which ACTA, by contributing to a more robust international enforcement of IPRs can enhance the EU's relative commercial and economic performance. The chapter ends with some concluding thoughts on the economic value of ACTA to the EU.

5.2. IPRs and their complex economic nature

Economists are concerned with the efficient allocation of scarce resources to unlimited wants and find that private property rights are a plausible way of dealing with scarcity in an efficient manner. Knowledge, however, is a unique resource that it is not inherently scarce. Theoretically, the potential use of existing knowledge is unlimited and may be diminished only when such knowledge becomes obsolete. Thus, the use of an invention by one individual does not reduce its accessibility to others, but rather is more likely to increase it. Patents, copyrights, trademarks and other forms of IPRs establish exclusive ownership of varying types of knowledge, allowing their owners to restrict or even prevent others from using it. The result, as Hindley (1971) puts it, is that "the establishment of private property rights in these cases artificially creates the symptoms of scarcity; they do not derive from it."¹²⁴

Consider, for example, the case of patents. Here the central issue is the structural trade-off built into the patent system between the aim to increase the amount of available knowledge in the future and the inhibition of the efficient use of existing and available knowledge in the present.¹²⁵ On the one hand, there would be under-production in inventive activities due to free-riding.¹²⁶ This represents a unique situation of market failure in which the incentive to innovate is diminished if work is copied without any reward for the innovator. Establishing property rights,

¹²³ European Commission "Commission Services Working Paper" 27 April 2011. Available at:

http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (Accessed 9.05.2011)

¹²⁴ BV Hindley, *The Economic Theory of Patents, Copyrights, and Registered Industrial Designs: Background Study to the Report on Intellectual and Industrial Property*, Economic Council Of Canada, Ottawa, 1971.

¹²⁵ K Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in National Bureau of Economic Research (ed.), *The Rate and Direction of Inventive Activity: Economic and Social Factors*, Princeton University Press, Princeton, New Jersey, 1962, pp. 609–626; Hindley, *ibid.*, pp. 12–13.

¹²⁶ *Ibid.*

i.e. patents, allows inventors—both firms and individuals—to secure commercial returns for their work and thus provides an incentive to invest in future inventive activities. On the other hand, a patent system inhibits the dissemination of existing knowledge and grants the patent holder monopoly powers through its exclusive right to control both the quantity and the price of its invention.

In principle, economists should be able to say whether the protection of IPRs generates a net loss or benefit to society, or more importantly which is the best balance between more available knowledge in the future and less accessible knowledge in the present. As yet no conclusive answer to these questions is available notwithstanding the availability of a rich and in-depth literature on the economics of IPRs.¹²⁷ In this context, the term “paradox of patents”, which was coined by Robinson as early as 1956, seems to capture the true nature of the patent tradeoff: “... by slowing down the diffusion of technical progress, patents insure that there will be more progress to diffuse.”¹²⁸

Economists also disagree about the effects of patents on the allocation of resources to inventive activities, the allocation of resources within the sphere of inventive activities and on the allocation of inventions as a factor of production.¹²⁹ The optimum term of protection is also disputable. A longer patent term increases the incentive to invent but also prolongs the restriction on the use of existing knowledge. Therefore, not only is it difficult to establish a single optimal patent term, but it is also likely that different inventions require different terms of protection. Thus, since a decision on a specific patent term for all inventions is bound to be arbitrary, for different inventions there may be a term that is more socially desirable than the current period of twenty years.¹³⁰ Back in the 1950s, Machlup (1958) argued that “no economist on the basis of present knowledge could possibly state with certainty that the patent system, as it now operates, confers a net benefit or a net loss to society”.¹³¹

As a result, we cannot really predict what would be the optimal level of protection, both in scope and in term, to induce the “perfect” level of innovation. On the one hand, theoretical and empirical research, certainly suggests that IPRs are an important and necessary factor for future innovative activities. On the other hand, we are not yet at a point at which economists can calculate the optimal level of IP protection for a certain innovative activity. Moreover, and as will be discussed below, IPRs cannot and should not be considered in isolation. There are other factors that contribute to innovation, making the optimum choice of IPR policies for innovation difficult to determine.

127 For an in-depth economic review of the patent system, see *ibid.*; F. Machlup, *An Economic Review of the Patent System*, Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, Study No. 15, Washington, D.C., 1958; C. Primo-Braga, *Guidance From Economic Theory*, in W. E. Siebeck (ed.), *Strengthening Protection of Intellectual Property in Developing Countries*, World Bank Discussion Papers No. 112, The World Bank, Washington, D.C., 1990, pp. 17–32.

128 J. Robinson, *The Accumulation of Capital*, Macmillan, London, 1956, p. 87.

129 Hindley, 1971, pp. 1–31.

130 W. D. Nordhaus, *Invention, Growth and Welfare*, MIT Press, Cambridge, Massachusetts, 1969, Chapter 5; F. M. Scherer, *Nordhaus' Theory of Optimal Patent Life: A Geometric Reinterpretation*, *American Economic Review*, Vol. 62, June 1972, pp. 422–427.

131 Machlup, 1958, p. 79.

5.2.1. IPRs and trade

Different countries may find it in their interests for various economic and commercial reasons to either support or reject a stronger international IPR system. Of central importance are the effects of such a system on trade in IP-related products and its impact on the rate and magnitude of technology transfer and direct investment.

In trade an international system of IPRs creates an exclusive trading environment in IP-related products by enabling the owners of these products to become the sole exporters of the product concerned to all countries in such a system. Countries with more established knowledge-based capabilities (i.e. research intensive manufactures, pharmaceuticals, software, or creative products such as music, films, etc) will benefit from a strengthening of the international system of IPRs, such as through ACTA, not least in the context of enforcement.

These countries will not only improve their terms of trade, by becoming exporters of IP-related products, but will also benefit from additional income in the form of the higher prices that IP owners based in these countries are able to charge because of their exclusive position.¹³² On the other hand, countries with weaker knowledge-based capabilities are likely to benefit most by being outside such an international system, so they can freely exploit and imitate IP-related products in their own domestic economies. Where they are successful, these countries may even be able to compete with the original IP owners, thus becoming exporters of such products themselves.¹³³

The global ownership and commercial exploitation of IPRs is still dominated by developed countries and a select number of emerging economies. For example, the World Intellectual Property Indicators Report for 2010 shows that the lion's share of world-wide patent filings (using the Patent Cooperation Treaty – PCT System¹³⁴) is concentrated in the hands of applicants from a select group of countries. The United States still accounted for the largest share (29.6%) of PCT applications in 2009, followed by Japan (19.1%) and Germany (10.7%). These top three countries thus accounted for 59% of all PCT filings in 2009 (though their share has decreased from 64% in 2005).¹³⁵ Applicants from the business sector accounted for the majority (83.2%) of PCT applications in 2009. Universities and public research institutions jointly accounted for 7.7% with individuals making up the remaining 9%.¹³⁶

¹³² R Vernon, *The International Patent System and Foreign Policy*, Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 85th Congress, Second Session, Study No. 5, Washington, D.C., 1957; E Penrose, *The Economics of the International Patent System*, Johns Hopkins Press, Baltimore, 1951; JC Chin and GM Grossman, 'Intellectual Property Rights and North-South Trade', in R Jones and A Krueger (eds.), *The Political Economy of International Trade*, Basil Blackwell, Oxford, U.K., 1990, pp. 90–197.

¹³³ Penrose, 1951, pp. 95–96.

¹³⁴ The PCT makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. For an overview of the PCT, see the WIPO Website, at: <www.wipo.int/pct/en/treaty/about.htm>.

¹³⁵ World Intellectual Property Indicators, 2010 Edition, Geneva, p. 51-52

¹³⁶ *Ibid.*, p. 54

In terms of the distribution of “rents” from trade in IP-related goods and services, there is therefore a clear tension between “north” and “south.” The table below illustrates which countries have a total net surplus or net deficit in IP transactions – royalties and licence fees – in 2008. Royalties and licence fees cover the “the exchange of payments and receipts between residents and non-residents for the authorised use of intangible, non-produced, non-financial assets and proprietary rights (such as patents, copyrights, trademarks, industrial processes, franchises, etc.) and with the use, through licensing agreements, of produced originals or prototypes (such as manuscripts and films).¹³⁷

Figure 1: Intellectual property transactions - royalties and licence fees - 2008¹³⁸
(Millions of US Dollars)

Country	Exports	Imports	Net
Austria	912.5865	1612.773	-700.187
Belgium	1185.044	2137.181	-952.137
Canada	3415.055	8774.741	-5359.69
Czech Republic	55.41019	727.0577	-671.648
Denmark	2641.557	1718.718	922.8384
Finland	1481.671	2026.88	-545.355
France	10265.5	4911.561	5353.939
Germany	8829.97	11948.58	-3118.61
Greece	43.94478	709.5617	-665.617
Hungary	802.2521	2019.16	-1216.91
Ireland	1334.456	30172.48	-28838
Italy	823.2321	1790.017	-966.785
Luxembourg	336.324	541.8391	-205.515
Netherlands	19636.14	14310.76	5325.521
Norway	670.3901	718.7943	-48.4043
Poland	226.438	1756.354	-1529.62
Portugal	80.12598	496.4295	-416.45
Slovak Republic	163.9081	182.7868	-18.8787
Spain	789.5411	3229.941	-2440.4
Sweden	4884.385	2021.396	2862.988
Switzerland	12292.89	11601.07	691.8252
United Kingdom	13536.5	10114.23	3422.272
European Union 27	68552.66	93596.6	-25043.8
United States	93920	25781	68139
Japan	25687.17	18291.59	7395.582

¹³⁷ OECD, *Statistics on International Trade in Service* (Paris: 2005), p. 22.

¹³⁸ Calculations and compilation based on OECD *Statistics on International Trade in Service*.

5.2.2. IPRs, Technology Transfer and Foreign Direct Investment

The above analysis is based on a *static analysis* of a current economic snapshot, i.e. one based on the division of knowledge-based capabilities at a given point of time. There is therefore a need to consider the longer term *dynamic effects* of a stronger IPR enforcement system. Specific focus should be given to the extent to which such a system can pave the way for greater levels of foreign direct investment (FDI) and technology transfer which, in turn, would allow developing countries to climb up the innovation chain.

Today, there is growing statistical evidence suggesting that a stronger environment of IPRs contributes to an enhanced level of economic development, FDI and technology transfer in developing countries. Based on the most comprehensive empirical research to date, an OECD study of the relationship between IPRs, technology transfer and FDI in 115 countries found that in developed countries an increase of 1% in the strength of patent rights resulted in 0.5% of increase in FDI flow (based on licensing deals), which in turn resulted in the transfer of know-how, i.e. innovative capabilities.¹³⁹ The study found that in developing countries, including least developed countries, the effect is even stronger so that an increase of 1% in the strength of patent rights could be associated with an increase of 1.7% in FDI flows.

Léger (2006) has conducted a similar study of developing countries only,¹⁴⁰ in which he estimates the link between innovation and IPRs, and corrects for other determinants of innovation such as market demand, past innovative activities, economic conditions, political stability, human capital, financial capital and openness to trade. Comprising observations from 36 developing countries over 26 years (1970-1995), Léger reports that IPRs have a strong positive impact on investment and innovation in developing countries. Robbins (2006 and 2008) also finds that countries that have increased the level of patent protection over time, including developing countries such as Taiwan and South Korea, become larger recipients of income from IP-based activities, in the form of FDI and technology transfer, than other countries.¹⁴¹ Robbins finds that these countries benefit considerably from activities that are based on the licensing of patents and trade secrets.

It should be noted however, that while the above studies establish a positive link between the strengthening of IPRs and FDI activity in developing countries, this does not tell us much about the level of IPR protection. As it is not possible to say at what point IPR protection becomes counter productive, the main focus of the above studies is on the effect on FDI flows and technology transfer of narrowing IP gaps between "north" and "south". In this context, Fink and Maskus (2005) conclude that "existing research suggests that countries that strengthen their IPR regimes are unlikely to experience a sudden boost in inflows of FDI", yet "at the same time, the

¹³⁹ W Park and D Lippoldt, 'Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries', Working Paper No. 62, 2008, OECD, Paris.

¹⁴⁰ A Léger, 'Intellectual Property Rights and Innovation in Developing Countries: Evidence from Panel Data', Proceedings of the German Development Economics Conference, Berlin, 2006.

¹⁴¹ CA Robbins, *Measuring Payments for the Supply and Use of Intellectual Property*, International Association for Official Statistics (IAOS) Ottawa: Canada, 2006 and 2008, in particular table 8.

empirical evidence does point to a positive role for IPRs in stimulating formal technology transfer, through FDI in production and R&D facilities and through cross-border technology licensing."¹⁴²

As such, in terms of IPRs and trade there remains therefore a built-in tension between the static and dynamic costs and benefits, the distribution of rents from trade in IP-related products and the dynamic gains generated by increased levels of FDI and technological inflows (over time).

Certainly, this means that an analysis of ACTA should not only focus on the economic implications on developed countries, but also on developing countries, not least since these countries would be expected to raise their own level of protection to meet the standards of ACTA (i.e. the level of protection of developed countries). In other words the economic impact on developing countries may be more significant than that on developed countries that already practice the same level of IP enforcement level as stipulated by ACTA.

Given the EU focus of this paper, the following section considers EU aspirations of becoming a global leader on innovation and knowledge creation, as well as the EU's capacity and capabilities to create, protect, exploit and enforce its IP-based products.

5.3. Innovation in Europe

Innovation is fundamental to a growing European economy and is a key tactic in the strategy of overcoming the considerable obstacles that Europe will face moving forward.

In *Putting knowledge into practice: A broad-based innovation strategy for the EU* (2006)¹⁴³, the European Commission acknowledged the dependence of Europe's future on innovation. In doing so, it identified how tackling climate change, depleting national resources, sharp demographic changes and emerging security needs were all reliant on Europe's ability to harness innovation. It also stressed Europe's strong tradition for innovation and how the internal market allows innovative products to be commercialised on a large scale. The Commission argued that Europe's wealth of creative peoples and the strength of cultural diversity must be capitalised on to overcome the challenges it faces and to allow Europe to compete globally with the world's biggest economies.

The EU has been pursuing the comprehensive strategy to modernise the European economy set out in the Lisbon Strategy for Growth and Jobs.¹⁴⁴ The Lisbon Strategy was adopted in 2000 to make the EU the "most dynamic and competitive knowledge-based economy in the world" by 2010. It acknowledged the importance of research and innovation and provided a blueprint of key policy measures to further this objective, including increased investment in R&D, a reduction of red tape to promote entrepreneurship and achieving an employment rate of 70 per cent. Whilst, many of these targets were not met the Commission maintained that it would be

142 C Fink, and K Maskus, *Intellectual Property and Development Lessons from Recent Economic Research*, 2005, The International Bank for Reconstruction and Development (The World Bank) p.9.

143 European Commission, *Putting knowledge into practice: A broad-based innovation strategy for the EU*, 2006. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0502:FIN:en:PDF> (Accessed 22.04.2011).

144 European Commission, *Lisbon Strategy for Growth and Jobs*. See http://ec.europa.eu/archives/growthandjobs_2009/ (Accessed 22.04.2011).

simplistic to conclude therefore that the Lisbon Strategy had failed. Instead it pointed out that, whilst the targets were not met, the success in breaking new ground and promoting common action to address the EU's key long-term challenges provided the European Union with a platform to build upon.¹⁴⁵

This is the task of Europe 2020¹⁴⁶, the successor to the Lisbon Strategy. Europe 2020 highlights the increasing need to create new jobs to replace those that have been lost during the financial crisis. It also reaffirms the EU's conviction that innovation and creativity are the best means of successfully tackling the growing societal challenges facing the EU. As part of the Europe 2020 strategy, the European Commission has set out the key drivers for growth in the economy over the next decade, in particular the need for smart growth that fosters knowledge, innovation, education and a digital society. It is hoped that through this new strategy, the EU can develop a true "Innovation Union" by 2020, one of seven flagship initiatives announced, which would aim to improve conditions for innovation and ensure that innovative ideas can be turned into products and services that create growth and jobs.

In this context, Professor Luc Soete, the director of UNU-Merit (a research and training centre of United Nations University (UNU) and Maastricht University) conducted an important study, *The costs of a non-innovative Europe: the challenges ahead* (September 2010).¹⁴⁷ The study aims to highlight the importance of innovation for the future economy of Europe. In doing so, the study attempted to better understand the macro-economic impact of innovation policies in the Europe 2020 agenda.

The Soete study first quantified the impact of R&D and innovation on European growth and employment. This analysis was performed through a state of the art macro-modelling exercise out of the DEMETER project, funded by the European Commission. The initial simulation results from this showed three growth scenarios for the period between 2010 and 2025. The first was the current economic forecasts, the second was the economic forecasts before the financial crisis and the third was economic forecasts if the EU as a whole raised R&D spending to 3% of GDP from 2010 onwards. The results showed a large gap between pre-crisis economic forecasts and current forecasts; indeed the long-term structural gap in the EU's GDP is on average some 9%. But the model showed that by boosting R&D spending the EU could recover 45% of this gap by 2025. Similarly increased R&D expenditure could completely close the employment gap between pre-crisis and current forecasts by the end of 2015, with 3.7 million jobs created by 2025.

Paul Zagamé's follow-up paper entitled *The cost of a non-innovative Europe: What can we learn and what can we expect from the simulation works* (September 2010)¹⁴⁸ builds on these findings

¹⁴⁵ European Commission, *Lisbon Strategy evaluation document*, 2010. See

http://ec.europa.eu/archives/growthandjobs_2009/pdf/lisbon_strategy_evaluation_en.pdf (Accessed 22.04.2011).

¹⁴⁶ European Commission, Europe2020. See http://ec.europa.eu/europe2020/index_en.htm (Accessed 22.04.2011).

¹⁴⁷ L Soete, *The costs of a non-innovative Europe: the challenges ahead*, September 2010. See http://ec.europa.eu/research/social-sciences/pdf/demeter-costs-non-innovative-europe_en.pdf (Accessed 22.04.2011).

¹⁴⁸ P Zagamé, *The cost of a non-innovative Europe: What can we learn and what can we expect from the simulation works*, September 2010. See http://ec.europa.eu/research/social-sciences/pdf/demeter-costs-non-innovative-europe-zagame_en.pdf (Accessed 22.04.2011).

using simulation work carried out by NEMESIS, another project funded by the European Commission. Previous research based on this model found that every Euro spent on R&D generated €6 to €7 of GDP and that for €10 million roughly 300 jobs are created. In Zagamé's paper, he makes clear that the financial crisis tends to lead to a decrease in spending on innovation, i.e. it is pro-cyclical, which in an uncertain crisis discourages investment. Reinforcing the results made in Soete's paper, Zagamé argues that because spending on innovation is pro-cyclical it needs to be supported during times of crisis in order to mitigate further damage.

This recent research therefore suggests that innovation as well as the Europe 2020 agenda in general is fundamental to the growth of the European economy and that, in the context of the financial crisis, it has never been so important. Regardless of the undoubted long-term benefits for Europe of innovation, the short-term needs make such policies essential to encourage growth and create more jobs. Innovation helps Europe to recover from the financial crisis, as well as allowing it to compete with emerging market economies such as China and India, which threaten to overtake the EU in regards to investment in innovation.

5.3.1. Measuring European Innovation

But how innovative is Europe? The *European Innovation Scorecard*,¹⁴⁹ published by PRO INNO Europe, provided a comparative assessment of the innovation performance of the EU, under the Lisbon Strategy. In 2009, it showed that the EU was making progress towards improvements in its performance but that these were now threatened by the financial crisis. It found that over the preceding five-year period the European innovation had grown on average by 1.8% annually. Prominent areas of growth included public R&D expenditures, broadband access, IT expenditures, knowledge-intensive services employment and exports, high-tech manufacturing exports, and sales of new-to-market products. The study also illustrated how there remains a significant innovation gap between the EU and the United States and Japan, whilst the European lead over both China and India is declining. In fact, the speed at which China especially is closing the innovation gap with Europe indicates that the gap could be closed very soon.

Around the same time, PRO INNO Europe also published the *European Innovation Progress Report 2009*,¹⁵⁰ which tracks innovation policy developments in all EU states, as well as other major global economies. This also showed how the financial crisis had hit European investment in innovation with credit shortages making the financing of innovation more difficult. The policy approach to this, it argued, has been varied with "innovation leader" countries more likely to be proactive and think long-term, whilst "catch-up" countries exhibited a more defensive and short-term approach.

¹⁴⁹ PRO INNO Europe, *European Innovation Scoreboard 2009*. See <http://www.proinno-europe.eu/page/european-innovation-scoreboard-2009> (Accessed 22.04.2011).

¹⁵⁰ PRO INNO Europe, *European Innovation Progress Report, 2009*. See <http://www.proinno-europe.eu/trendchart/european-innovation-progress-report> (Accessed 22.04.2011).

With the substitution of the Europe 2020 for the Lisbon Strategy the *European Innovation Scorecard* became the *Innovation Union Scoreboard*,¹⁵¹ the first edition of which was published in 2010. This study used new indicators to better capture the performance of national research and innovation systems. The study confirmed that the US and Japan are maintaining an innovation lead over Europe. It also reinforced the view that Europe's innovation lead over countries such as China and Brazil was closing (though it noted a holding of the lead over India).

Another indicator of innovation in Europe is the *EU Industrial R&D Investment Scorecard*¹⁵² that presents information on the top 1,000 European companies and the top 1,000 non-European companies ranked by their investment in R&D. The 2009 report showed that, for the second year running, the R&D growth rate of EU companies was higher than that of the US, and outpaced Japanese companies for the fourth year running. The sectoral break down of this investment showed that high R&D intensity sectors, such as pharmaceuticals, biotechnology, software and computer services, formed 35% of the European investment but as much as 69% of US R&D investment. The growth of US investment in these sectors was also more than three times more than that in the EU over the last four years.

Another useful source of information regarding innovation in Europe is the annual *Innobarometer*, which surveys companies in selected innovation-intensive industry sectors. The latest report focused on innovation expenditure, innovation in public procurement tenders, and public and private initiatives to boost innovation. The report highlighted that one in ten companies were reliant on innovation as a primary source of sales income, whilst a quarter see innovation as a significant source of income. It also showed that companies that reported an increase in innovation investment between 2006 and 2008 were much more likely to introduce a product or service innovation compared to those with stagnant or decreasing investment in innovation. Over a third of companies also indicated increased spending on innovation in the past three years, yet only 12% anticipated a boost in their innovation budgets for 2009 and 28% thought that their 2009 innovation budget would shrink.

These reports highlight the importance of the private sector and industry in innovation, a decline in which is likely to have a significant effect on European economic growth and jobs. Yet such innovations will only ever come about when there is an incentive to innovate. This incentive relies heavily on the perceived gains from investment in intellectual property and on the protection of such gains for the creator in reward for the risk taken in investing. Patent activity provides a proxy for measuring innovation.

The OECD documents data on patent trends including statistics on triadic patent families, which are sets of patents (originating from the priority filing date), granted to the same inventor at the European Japanese and US patent offices. Looking at triadic families has a number of advantages. First, it improves international comparability. Secondly such patents are considered to be "high-value" or significant patents, as it is assumed the patentee would only take on the

¹⁵¹ PRO INNO Europe, *Innovation Union Scoreboard*, 2010. See http://ec.europa.eu/enterprise/policies/innovation/facts-figures-analysis/innovation-scoreboard/index_en.htm (Accessed 22.04.2011).

¹⁵² European Communities, *EU Industrial R&D Investment Scoreboard*, 2009. See <http://iri.jrc.ec.europa.eu/research/docs/2009/JRC54920.pdf> (Accessed 22.04.2011).

additional costs and delay related to the extension of the protection to other countries, if it is deemed worthwhile.¹⁵³ Figure 2 below shows the share of countries in triadic patent families for 2005 in which the EU was trailing both the US and Japan. In the same year, figure 3 shows that on triadic patent families per million of the population the EU is far below Japan, Switzerland, Israel, South Korea, the US and the OECD.¹⁵⁴ These statistics also show the wide gap between the development and developing world.

Figure 2: Share of countries in triadic patent families¹⁵⁵

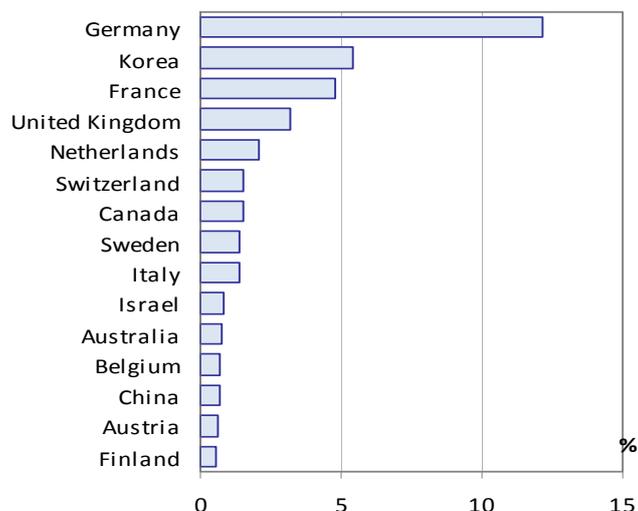
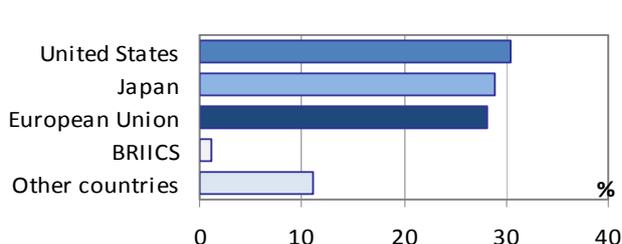
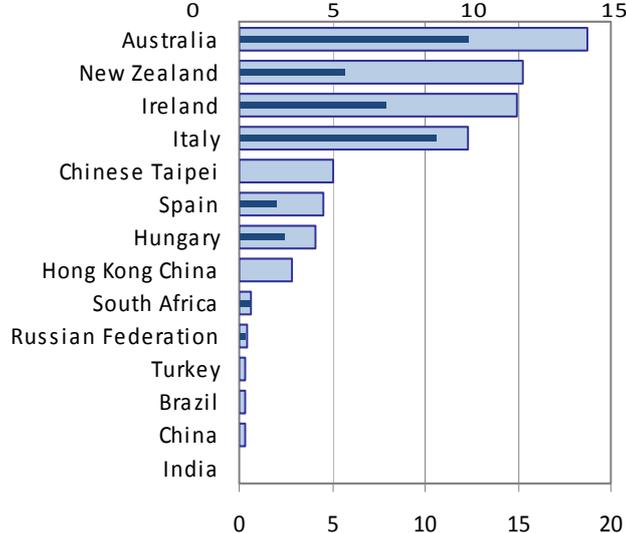
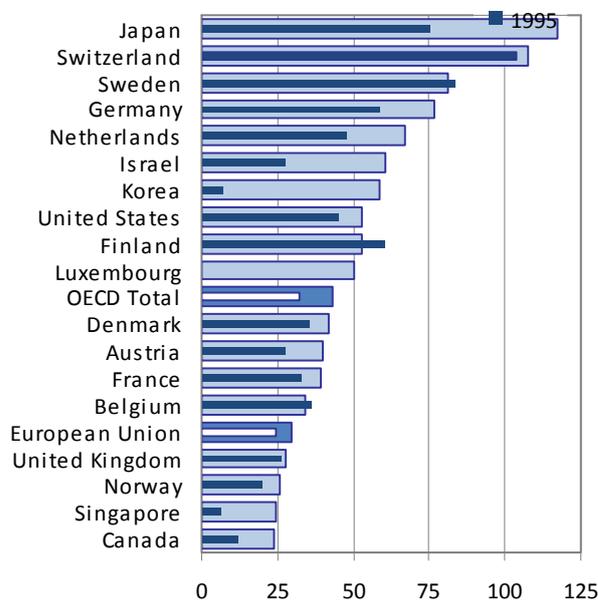


Figure 3: Triadic patent families per million population¹⁵⁶



¹⁵³ OECD, *op. cit.*, 2005

¹⁵⁴ Calculations and compilation based on OECD Statistics on International Trade in Service.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

What these measurements show therefore is that, alongside Europe's increasing dependency on innovation, there are indications that the Union's competitive edge may be waning. Comparative studies show that some emerging market countries, particularly China, are beginning to close the gap in terms of investment in innovation (though not in regards to patents). Europe is not making up any ground on leading countries, such as the United States and Japan (in either investment or patents). There are also indications from European industry that the financial crisis has had a negative effect on investment on innovation which, considering the arguments laid out earlier, could undermine the prospects for an innovation-led recovery from the financial crisis.

5.3.2. The importance of IPRs enforcement for EU Innovation

Most European-based institutions consider IPRs to be an important aspect (among other issues) in the EU's ability to compete in the global economy. It is argued that EU growth and jobs are hampered when ideas, brands and products are counterfeited and pirated. Rights, including patents, trademarks, design rights and copyrights serve as incentives for innovation and can help identify trusted producers.

The European Commission considers the promotion of IPRs as fundamental to achieving the stated goals of Europe 2020 and thus key to achieving economic growth, increased jobs and overcoming impending societal challenges. The Innovation Union seeks to establish a more coherent and efficient system of IPRs in Europe, mainly through the introduction of the Union-wide single patent recently approved by the European Parliament.¹⁵⁷ A Union-wide patent also promises to reduce the costs of the IP system so that innovators have more money to spend on investment.

It is also important to protect the IPRs of European businesses when trading in foreign countries. The Global Europe strategy¹⁵⁸ includes the aim of strengthening IPR protection for European companies operating in third markets and in particular better enforcement of existing commitments on IPRs in emerging economies.

This is echoed by EU Member States such as in the report entitled *Patents in the Global Economy* (2010)¹⁵⁹ published by the UK Intellectual Property Office. This report points out that inadequate patent protection can stifle both the invention and innovation process. It argues that this is because pioneering breakthroughs are extremely rare and that most innovation comes in the form of the relatively mundane process of minor adaptations to existing technologies. This requires companies to adopt new management and organisational systems, as well as new product and quality control mechanisms but investment in such measures is unlikely in an environment where patent protection is weak or unpredictable. In all, this report argues that

¹⁵⁷ *Pharma Times Online*, "EU Parliament approves central European patent", 18 February 2011. See http://www.pharmatimes.com/Article/11-02-18/EU_Parliament_approves_central_European_patent.aspx (Accessed 22.04.2011).

¹⁵⁸ European Commission, *Global Europe: Competing in the World*, 2006. See http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (Accessed 22.04.2011).

¹⁵⁹ D Matthews, *Patents in the Global Economy*, 2010. See <http://www.ipo.gov.uk/ipresearch-pglobal-201012.pdf> (Accessed 22.04.2011).

patents have the potential to stimulate invention and innovation, but that they can also have unintended consequences and must be utilised as part of a wider set of policy instruments. In particular, the author is referring to patents ability to both stimulate the inventive process but also hinder development if a balance between rewarding inventors and safeguarding the public domain for a wider public good is not achieved.

5.3.3. Counterfeiting and Piracy

If there appears to be a consensus in Europe that innovation is a key driver of economic growth and that IPRs are important for innovation, what can be said about the costs of counterfeiting and piracy for the European economy? The assumption is that counterfeiting undermines innovation and thus destroys jobs. This section considers recent studies that have attempted to assess the economic effects of counterfeiting and then looks in more detail at counterfeiting and piracy in specific sectors.

The OECD produces the regular *Economic Impact of Counterfeiting*,¹⁶⁰ which outlines the costs of counterfeiting and piracy for the economy as a whole, for rights-holders, consumers and for governments. The OECD reports argue that that without adequate protection of IPRs the incentive to develop new ideas and products is reduced, innovation weakened, research and ultimately growth adversely affected. In addition to stunting innovation, the OECD also identifies other adverse effects of counterfeiting and piracy in the shape of financial gain for criminal networks, the negative effect on the environment and the loss of jobs and foreign direct investment. Not only do rights-holders face significant lost sales, royalties, reputation and investment, they also incur significant costs in combating the problem. Consumers lose in that they are exposed to substandard products and do not get value for money from counterfeit and pirated goods. Finally, the OECD points out that governments receive lower tax revenues, incur higher costs for enforcing and implementing anti-counterfeiting activities and are hurt by the effect that corruption, synonymous with counterfeiting, can have on the integrity of public institutions.

However, the OECD report makes clear that whilst it is possible to identify these costs it is virtually impossible to find accurate statistics on the scale of the problem, not least because of the covert nature of the activity. In its most recent analysis, the OECD attempts to pull together some data based on international trade statistics of landed customs value – i.e. the value of merchandise assigned by customs officials. From this analysis, it estimates that international trade in counterfeit and pirated products may have amounted to some \$200 billion in 2005. However, this figure does not include goods produced domestically and digital products distributed through the Internet, which if added would significantly increase the total sum. Finally, the report concludes that more needs to be done to detect and undermine counterfeiting and piracy at the point where infringement originates and that action is required to keep the Internet from becoming an even more prominent distribution channel for counterfeit goods and piracy.

¹⁶⁰ OECD, *The Economic Impact of Counterfeiting and Piracy*, 2008. See http://www.oecd.org/document/4/0,3746,en_2649_34173_40876868_1_1_1_1,00.html (Accessed 22.04.2011).

5.3.4. Creative Industries

The TERA consulting report, entitled *Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries* (March 2010),¹⁶¹ looked specifically at the impact that digital piracy has had on creative industries. The report highlighted the importance of the creative industries, which generated a total of €862 billion in value added to GDP in 2008, or 6.9% of total European GDP and were responsible for 14.4 million jobs, or 6.5% of the EU employment force. It estimated that in the same year the creative industries in Europe lost a cumulative €9.9 billion in income and 186,400 jobs due to piracy.

The report warns of the future consequences of piracy for creative industries. It argues that the growth of broadband and ongoing digitalisation of creative industry products will also lead to an expansion of digital piracy and presents two scenarios for the impact this will have on creative industries in Europe. The first scenario calculates retail losses and cumulative job losses based on current projections of growth in file-sharing traffic, which is expected to rise at an annual rate of over 18% between 2005 and 2015. This scenario envisages losses of over €32 billion in sales and over 600,000 jobs by 2015 compared to 2008. The second scenario based on the growth of consumer IP traffic of over 24% between 2008 and 2015, presents an even bleaker picture with €56 billion lost in retail sales and 1.2 million European jobs destroyed between 2008 and 2015. Both projections assume no significant change to governments' policies.

Another report on the threat of digital piracy for the software industry, by the Business Software Alliance supports these findings. In *Software Piracy on the Internet: A Threat to Your Security* (2009),¹⁶² it argues that roughly 41% of all software installed on personal computers is obtained illegally, with foregone revenues to the software industry totalling \$53 billion. Furthermore, it points to the multiplier effects of sales of software which means that for every \$1 of PC software sold another \$3 to \$4 is generated in local IT support and distribution services. Losses in software sales will therefore have a significant potential knock-on impact of lost revenues elsewhere. In addition, the report shows that those markets with high software piracy rates also have high incidences of malware infections. This is because threats (such as viruses, worms, Trojans, and spyware) are designed to exploit vulnerabilities in common software products, forcing developers to constantly develop patches to update software and protect it from emerging threats. Those that use pirated and unlicensed software will not have access to such updates and so are vulnerable to such threats.

In their most recent report, entitled *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy* (2010),¹⁶³ the industry assesses that a 10% reduction in the piracy rate for PC software over four years would create \$142 billion in new economic activity, whilst adding nearly 500,000 new jobs and generating about \$32 billion in new tax revenues.

¹⁶¹ TERA Consulting, *Building a Digital Economy: The Importance of Saving jobs in the EU's creative industries*, March 2010. See [http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Building%20a%20Digital%20Economy%20-%20TERA\(1\).pdf](http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Building%20a%20Digital%20Economy%20-%20TERA(1).pdf) (Accessed 22.04.2011).

¹⁶² Business Software Alliance, *Software Piracy on the Internet: A Threat To Your Security*, 2009. See <http://portal.bsa.org/internetreport2009/2009internetpiracyreport.pdf> (Accessed 22.04.2011).

¹⁶³ Business Software Alliance, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy*, 2010. See <http://portal.bsa.org/piracyimpact2010/studies/piracyimpactstudy2010.pdf> (Accessed 22.04.2011).

5.3.5. Pharmaceuticals

According to the Commission in its proposal for amendment to Directive 2001/83EC,¹⁶⁴ there are approximately 3,700 pharmaceutical companies in the EU, which generate a turnover of €170 billion and employ 634,000 people. In pharmaceuticals there is also a worrying growth in incidents of counterfeiting. In 2006, EU statistics show that there were 2.7 million counterfeit products seized at EU customs borders, an increase of 384% compared to 2005. The Pharmaceutical Security Institute (PSI), which monitors and records incidents of counterfeiting annually, also suggests a rise between 2002, when just 196 cases were reported, and 2009, when 2,003 cases were reported.¹⁶⁵ Whilst the PSI recognises that improved data collection, greater law enforcement efforts and greater public awareness have all contributed to the identification of incidents, it maintains that such an increase exposes the previously unknown extent of criminal activity in the pharmaceutical sector and that such criminal activity is on the rise.

The Commission also stressed that the problem of counterfeit medicines was almost certain to increase. This is due to a variety of reasons including an increase of global trade of pharmaceuticals, an increasingly diverse and sophisticated number of actors in the supply chain, and the fact that counterfeit producers are increasingly parts of highly-efficient networks linked to organised crime, trade in weapons and illegal drugs and smuggling. The Commission has made clear the two-fold risk for public health that counterfeit medicines pose. First, such medicines may not contain the proper active ingredient in the proper quantity and so result in a patient's condition going untreated. Second, counterfeits may contain toxic materials that result in a patient being poisoned.

In 2008 the Commission undertook an impact assessment of counterfeit medicines to support its proposals to the European Council and Parliament.¹⁶⁶ This assessment noted that rises in counterfeit medicines were probably only the "tip of the iceberg" as the illegal nature of counterfeits naturally meant there were insufficient official statistics. Nevertheless, the impact assessment attempted to calculate the costs of non-action on the issue of counterfeit medicines. To do so it estimated that around 1.5 million packs of counterfeit products entered the legal supply chain in Europe each year, equal to around 1 out of every 20,000 packs of pharmaceuticals. The study first estimated the direct costs for on the healthcare system of dealing with the toxic effects of counterfeit medicines and non-effect of fake medicines. It then estimated the indirect costs, including the productivity loss of patients too sick to work or who die prematurely. Finally, it estimated other quantifiable burdens, such as costs of recalls and destroying seized goods. These estimates produced annual costs resulting from counterfeit products in the legal supply chain of around €950 million. On this basis the Commission's report calculated the direct and indirect costs to society of non-action on counterfeit medicines to be

¹⁶⁴ European Commission, *Proposal for a Directive of the European Parliament and of the Council*, December 2008. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0668:FIN:en:PDF> (Accessed 22.04.2011).

¹⁶⁵ Pharmaceutical Security Institute, Counterfeit Situation. See <http://www.psi-inc.org/geographicDistributions.cfm> (Accessed 22.04.2011).

¹⁶⁶ European Commission, *Accompanying document to the Proposal for a Directive of the European Parliament and of the Council*, December 2008. See http://ec.europa.eu/health/files/pharmacos/pharmpack_12_2008/counterfeit-ia_en.pdf (Accessed 22.04.2011).

between €9.5 and €116 billion by 2020, depending on "optimistic", "realistic" and "pessimistic" scenarios.

At this point it is important to recall that the impact of ACTA in addressing the problems discussed above is likely to be limited. Central to the ACTA agreement is the importance of signatories to install common national defenses against IPR violations, which should allow for a harmonized approach to IPRs globally. Such agreements are hoped to become a standard by which future bilateral or free trade agreements are then judged. But ACTA is also supposed to be in line with the existing obligations of the signatory states. So it does not in itself constitute stronger IPR protection. Its main impact will likely come from how it influences the spread of more effective enforcement through other agreements such as bilateral FTAs that include IPR protection. Whilst this is discussed in much more detail in the other chapters, it is important to note that as a consequence the impact of ACTA is limited, in particular in relation to cross-border activities and EU competence, by the fact that it aims to limit itself to current regulations.

5.4. ACTA and Europe

Overall, when considering the economic viability of ACTA from the EU's trade policy perspective, there is merit in supporting ACTA as a contribution to a framework that strengthens the rights of IP holders. In order to enhance the EU's ability to compete in global markets there are benefits in international agreements that enhance the enforcement of IPR that enable the EU to fully commercialise and exploit its intellectual, innovation and knowledge-based assets. ACTA also promises to help in the task of limiting the damaging effect of counterfeiting and piracy on EU economic growth and jobs.

That being said, there are two equally important caveats.

First, it is not clear how much economic benefit ACTA will actually generate for the EU. The EU must first develop stronger knowledge-based activities before it can benefit from better protection of property rights. This depends on a range of factors other than the protection of property rights per se.

Second, there is the question of whether strengthening IPR protection is economically efficient, particularly when it comes to extending the duration of such protection. That is to say, there is a point at which further strengthening IPRs becomes counterproductive and could in fact hamper innovation. One should bear in mind that the standard represented by ACTA is indeed a European standard as well as the standard of other developed countries. As we have seen in previous chapters there may be areas in which ACTA may go "too far".

ACTA should by no means be seen as a silver bullet, as it must be supplemented by other strategic initiatives aimed at boosting the innovative capacity of the EU.

Finally, while this chapter has focused primarily on the economic implications of ACTA for the EU, it is important to recall that ACTA will also have an impact on developing countries that will be expected to change their own domestic IP regimes to meet the standards set by ACTA. ACTA should also serve the interests of developing countries otherwise it could be perceived as a one-sided deal in terms of its long-term economic benefits, in which case it is unlikely to stand the test of time.

6. DETAILED ANALYSIS OF THE AGREEMENT

6.1. Scope of the Agreement

ACTA functions as a minimum standards agreement, in much the same manner as the TRIPS Agreement. While ACTA contains a significant number of 'shall' obligations, many provisions are 'permissive' in that they require "at least" application to copyright piracy and trademark counterfeiting¹⁶⁷ or establish that parties "may" institute further measures e.g. on criminal liability¹⁶⁸, seizure of assets¹⁶⁹ or disclosure of information.¹⁷⁰ Article 1.1 TRIPS states that members may provide more extensive protection than is required by the Agreement. In the TRIPS Agreement, most of the permissive terms are addressed at exceptions or limitations to the rights.¹⁷¹ However, in Part III of the TRIPS Agreement, dealing with enforcement, there is some precedent for the pattern found in ACTA where the permissive terms appear to be more focused on allowing parties to establish more extensive or stronger provisions protecting rightholders.¹⁷² Article 2.1 ACTA replicates the text in Article 1.1 TRIPS, allowing parties to establish more extensive protection. It also includes a similar caveat limiting such further protection to measures that are not inconsistent with ACTA. The TRIPS Agreement also contains mandatory limitations or conditions on the exercise of rights and enforcement provisions, which are largely absent from ACTA. Article 1.1 TRIPS does place a limitation on the nature and extension of further rights by members noting that such further protection should "not contravene the provisions of this Agreement." This has suggested to some commentators that TRIPS imposes ceilings on the nature and extent of such further protection under Article 1.1 TRIPS.¹⁷³ In the enforcement section in particular, there are several provisions which set mandatory limitations on the extent of enforcement provisions, and establish the rights of defendants in enforcement proceedings. For example, Article 50.4 TRIPS requires notice without delay to parties affected by

¹⁶⁷ See Articles 9.2, 9.3 and 9.5 ACTA on Damages, Article 10.1 ACTA on Other Remedies, Article 12.3 on Provisional Measures, Article 23 ACTA on Criminal Enforcement.

¹⁶⁸ Article 23.3 ACTA on protection of cinematographic works.

¹⁶⁹ Article 25.5 ACTA on seizure and forfeiture of assets.

¹⁷⁰ Article 22 ACTA on disclosure of information.

¹⁷¹ See e.g. Article 8.1 on public interest measures; Articles 15, 16, 17 and 21 on trademarks; Article 24.7 on geographical indications; Article 26.2 on industrial designs; Articles 27.2, 27.3, 30 on patents; Article 40.2 on anti-competitive practices; Article 44.2 on injunctions.

¹⁷² An example of this can be found in Article 45.2 TRIPS on damages, which allows parties to permit their authorities to order recovery of profits or payment of damages even in the absence of intent to infringe. Other examples include: Article 47 on the right to information; Article 50 on extension of provisional measures beyond counterfeit trademark goods and pirated copyright goods; Article 57 on right of inspection and information; Article 60 on *de minimis* imports; Article 61 on extension of criminal procedures beyond counterfeit trademark goods and pirated copyright goods.

¹⁷³ See e.g. H Grosse Ruse - Khan and A Kur 'Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection' Max Planck Papers on Intellectual Property, Competition & Tax Law Research Paper No.09-01. URL:<http://ssrn.com/abstract=1326429> (Accessed 22.04.2011); H Grosse Ruse - Khan, 'Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection' in: *Trade, Law and Development, 2009*, Volume 1, Nr. 1, p. 56 - 102. For a concurring critique of the concept see: PK Yu, 'The Objectives and Principles of the TRIPs Agreement' *Houston Law Review*, Vol. 46, pp. 797-1046, 2009. See SSRN: <http://ssrn.com/abstract=1398746> (Accessed 22.04.2011).

provisional measures adopted *inaudita altera parte*, including a review and a right to be heard.¹⁷⁴ ACTA parties, who are all WTO members, are obliged to comply with these provisions.

Beyond Article 2.1 ACTA, ACTA contains few provisions that could be categorized as mandatory limitations or 'ceilings'. Article 6.1 ACTA requires that parties provide safeguards against abuse of enforcement procedures and Article 6.2 ACTA requires that procedures be fair and equitable. These are similar to provisions in TRIPS (Articles 41.1 and 42). The lack of mandatory limitations in ACTA has consequences for the manner in which it is implemented. ACTA provides little guidance on how the parties are to implement ACTA in a consistent and mutually supportive manner with the TRIPS Agreement. Beyond the statement in Article 1 ACTA that "[n]othing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement", there is no further reference to the TRIPS Agreement. ACTA parties are left to their own devices in establishing the appropriate relationship to TRIPS, which is much more complicated than the simple savings clause embodied in Article 1 ACTA would suggest. The failure of ACTA to make reference to the appropriate provisions of the TRIPS Agreement that provide mandatory safeguards and limits reflects a serious problem in ACTA. ACTA purports to build on the TRIPS Agreement, but it does not, except in the most general terms (Article 1 ACTA), establish a consistent and workable framework for ensuring a reading the two agreements together. What first appear to be gaps in ACTA may actually be filled by the TRIPS Agreement. But the fact that that these gaps always seem to be those that establish safeguards or limits on rightholder action, only emphasizes the importance of the Parliament ensuring that there is a proper reading of the two agreements together. As ACTA covers much of the same ground as TRIPS Section III on Enforcement, the detail of where it adds to, maintains or omits TRIPS provisions will be crucial in ensuring its effectiveness.

6.1.1. Subject Matter Coverage

Nominally, the Agreement covers all the major categories of intellectual property¹⁷⁵ defined in Article 5(h) ACTA as "all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement". These include: Copyright and related rights; Trademarks; Geographical Indications; Industrial Designs; Patents; Layout-Design (Topographies) of Integrated Circuits; and Protection of Undisclosed Information.¹⁷⁶ Except where specifically noted, ACTA addresses not only purely wilful trademark counterfeiting and copyright piracy, but all intellectual property rights addressed in the Agreement.¹⁷⁷ Special note is made of counterfeit trademark goods and pirated copyright goods which, unlike other subject

¹⁷⁴ Other examples include: Article 42 on fair and equitable procedures noting that defendants "shall have the right to written notice which is timely and contains sufficient detail ..."; Article 50.6 on revocation within a reasonable period at the request of the defendant; Article 51 on notice of suspension of release of goods from customs, requiring defendant to be notified immediately; Article 55, limiting the duration of suspension, in the absence of other judicial or other proceedings on the merits.

¹⁷⁵ Article 6.1 ACTA.

¹⁷⁶ Agreement on Trade Related Aspects of Intellectual Property, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

¹⁷⁷ Article 6.1 ACTA.

matter, are specifically and relatively narrowly defined in the ACTA¹⁷⁸, and are the subject of special further provisions.¹⁷⁹ However, where an ACTA provision is not specifically limited to pirated copyright goods, and counterfeit trademark goods, it covers ALL infringements defined in Article 5(h) ACTA. As pointed out by at least one major group of European intellectual property academics¹⁸⁰, this would include all forms of trademark infringement, such as trademark dilution, taking unfair advantage, and damage to the reputation of the mark, not just the use of identical marks. The same would be true in the case of copyright infringements, such as alleged infringement of rights of adaptation, or infringement due to substantial similarity.¹⁸¹ The inclusion of such categories of infringement encroaches on issues relating not just to piracy and counterfeit by illegitimate and criminal actors, but to the normal economic processes of competitive behavior between legitimate actors in knowledge-based markets (e.g. film, television, and software production and distribution). In such situations there may be legitimate disputes as the extent to which one product is derivative of, or competes unfairly with another e.g. the dispute in U.K. courts between Dan Brown and the authors of Holy Blood Holy Grail, regarding the extent to which Brown had 'copied' substantial parts of their non-fiction book in writing his fiction bestseller "The Da Vinci Code."¹⁸²

In effect, issues relating to injunctions (Article 8), damages (Article 9.1), provisional measures (Article 12.1 and 12.2), apply to all categories of IP and the related types of infringements.

There are some basic exclusions that modify this broad coverage. Article 3.1 ACTA clearly states that ACTA does not require a party to apply ACTA measures to intellectual property subject matter that is not protected under its domestic law. Therefore, those countries that do not have a system of protection of Geographical Indications (GIs) protection *per se* do not have to apply any of the provisions of ACTA to relating to GIs.¹⁸³ (For more on GIs, see Chapter 6).

There are specific exclusions for patents and protection of undisclosed information from the scope of border measures. Footnote 6 ACTA notes that these do not apply to patents and undisclosed information (including test data). Footnote 2 ACTA also notes that parties may also exclude patents from civil enforcement measures under the ACTA.

More generally there are specific areas that contain an obligation to apply specific obligations under ACTA at least to pirated copyright goods and counterfeit trademark goods. Thus the entire section on criminal measures¹⁸⁴ needs only to be applied to "wilful" piracy or counterfeiting, but parties are free to extend its application to other subject matter (e.g. patents,

¹⁷⁸ Articles 5(d) and 5(k) ACTA. These replicate the definitions in the TRIPS Agreement in Footnote 14.

¹⁷⁹ Article 10 on other remedies; Article 23 on criminal offences; Article 25 on seizure, forfeiture and destruction.

¹⁸⁰ See Para 5 'Opinion of European Academics on the Anti-Counterfeiting Trade Agreement', February, 2011 See http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf. The list of signatories is available at: <http://www.iri.uni-hannover.de/subscriber.html> and includes, as initial signatories, 23 European intellectual property scholars with broad geographical coverage and from diverse schools of thought on intellectual property issues. As of April 1, 2010 there were over 150 signatories.

¹⁸¹ K Weatherall, 'ACTA April 2010 - Analysis of Provisions' The Selected Works of Kimberlee G Weatherall. See <http://works.bepress.com/kimweatherall/20>, p6.

¹⁸² Baigent & Anor v The Random House Group Ltd [2007] EWCA Civ 247 (28 March 2007).

¹⁸³ This is particularly important for those jurisdictions that use alternative methods for protecting GIs.

¹⁸⁴ Section 4 ACTA.

designs, and GIs), as well as to other non-wilful forms of copyright and trademark infringement. Clearly, parties have the freedom to NOT carry out such an extension. However since ACTA functions as a minimum standards agreement, it is clear that pressure will be brought to bear by domestic rightholders and by other Parties to implement the agreement at the highest common standard.

6.1.2. Safeguards

The ACTA preamble states that parties aim to take into account the concerns of consumers and end-users. For example, paragraph 5 of the preamble expresses the goal that enforcement should not be implemented in a way that poses greater barriers to trade, and, paragraph 6 notes that in the digital environment, the rights of rightholders should be balanced with those of users and service providers. The preamble addresses concerns that increased enforcement may pose problems for access to medicines in paragraph 9. A more complete analysis of the nature and scope of safeguards with respect to access to medicines can be found in Chapter 3 assessing the conformity of ACTA with the TRIPS Agreement and the Doha Declaration on Public Health.

Article 2.3 ACTA also incorporates the more general TRIPS safeguards contained in Articles 7 and 8 of the TRIPS Agreement. Article 8.1 TRIPS allows parties to adopt “measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.” Article 8.2 TRIPS allows parties to provide measures to prevent the abuse of intellectual property rights. In both cases, the caveat is that measures taken by members must be consistent with the provisions of the TRIPS Agreement. Neither Article 8.1 nor Article 8.2 state any specific provisions of the TRIPS Agreement with which the measures must be consistent. They simply refer to “provisions of this Agreement.”

Some guidance as to the nature and scope of Article 8.1 can be found in WTO jurisprudence developed in the context of exceptions to patentability. The WTO Panel in *Canada-Pharmaceuticals*¹⁸⁵ has interpreted Article 8.1 TRIPS. The panel noted that Article 8.1 has some interpretive force, but according to the panel, the existence of Article 30, and the way it was narrowly constructed, is a significant indicator that Article 8.1 should not be read to alter the “negotiated” balance exhibited by the TRIPS Agreement.¹⁸⁶ The Panel believed that much of the balancing required by Article 8.1 is already exemplified by Article 30 and other similar flexibilities. Nevertheless the WTO Panel also considered that Article 8 TRIPS should still play a role, however limited, in the panel’s interpretation of Article 30 TRIPS in the specific *Canada-Pharmaceuticals* case. Thus, despite the apparent clarity of Article 2.3 ACTA in applying the principles of Articles 7 and 8 of the TRIPS Agreement, the WTO jurisprudence suggests that the inclusion of these TRIPS provisions is not an assurance of so-called “pro-access” outcomes in interpreting ACTA obligations.

Article 2.1 ACTA reiterates the Article 41.5 TRIPS statement that nothing in the agreement implicates the distribution of resources between intellectual property enforcement and other

¹⁸⁵ *Canada-Pharmaceutical Patents*, WTODS114 (2000).

¹⁸⁶ *Canada-Pharmaceutical Patents*, WTODS114 (2000), para 7.26.

areas of law enforcement. Of particular importance to the EU are the privacy and disclosure statements contained in Article 4 ACTA. These are intended to interact with and limit the requirements for disclosure of information in civil enforcement in Article 11 ACTA and Article 22 ACTA on border measures. Article 4.1(a) ACTA maintains the right of Parties to preserve existing privacy laws. Article 4.1(b) and 4.1(c) ACTA, respectively preserve Parties' rights not to disclose confidential information either for public interest purposes or for the protection of legitimate business interests. Both provisions appear to leave the definition of what constitutes 'public interest' or 'legitimate commercial interests' to each Party. Nevertheless, without clear definition these become the subject of potential pressure points in bilateral consultations between Parties. This is especially important as disclosure of information is a crucial element of both civil and criminal enforcement under ACTA. A more detailed analysis of the civil liberties and privacy implications of Article 4 ACTA can be found in Chapter 6.

More safeguards can be ascertained from the general obligations of Article 6 ACTA. If these are taken and implemented seriously, they provide a strong basis on which stakeholders can ensure balanced implementation. Article 6.1 notes that procedures made available under the ACTA must not be implemented in a way that creates barriers to legitimate trade and that Parties must provide safeguards against their abuse. Article 6.2 emphasizes the requirement that procedures be fair and equitable AND that the rights of all participants be protected. However, where specifically implemented by other provisions in the ACTA, these safeguards would only be useful where specific relationships between rightholders and defendants had not already been mandated by ACTA. The obligatory language of these provisions means that they are operative and must be given as much effect as other provisions of the Agreement.

The next few sections will describe key elements of ACTA procedures, raise some more detailed issues with respect to the agreement, and provide some analysis of potential effectiveness. It is not, however, intended to be a blow-by-blow description of the content of the Agreement.

6.2. Civil Enforcement

6.2.1. In General

Given that intellectual property rights are private rights, which are generally meant to be privately enforceable, most activity under the ACTA will be civil disputes regarding IP infringement. Except where otherwise stated, the civil enforcement provisions are applicable to all types of infringement proceedings; as between legitimate competitors in a dispute as well as between a rightholder and an unidentified infringer.

6.2.2. Injunctions

Injunctions apply not just to infringers but also to related third parties according to Article 8.1 ACTA. Article 8.2 ACTA allows Parties to make an exception for goods produced under a compulsory license, provided that at least the payment of remuneration is available under a license. Thus, if a Party wishes, it may choose not to apply injunctions to goods produced under a compulsory license, if they are part of a dispute regarding the validity, status or

appropriateness of the issued license. This is a novel provision whose content has never been tested, but is clearly meant to address concerns regarding the use of injunctions to prevent the entry into ACTA Party markets of goods produced under compulsory licenses. However because it is not a mandatory exception, it is unclear how many ACTA Parties will use that option and whether in failing to do so they will be in compliance with their obligations under the Doha Declaration on the TRIPS Agreement and Public Health.¹⁸⁷

6.2.3. Damages

Two issues arise with respect to damages. The first is that damages apply not only to a knowing infringement but also to infringement due to negligence.¹⁸⁸ Thus those who could be considered to have reason to know they were or might be infringing, would be liable for damages even if they did not intend to infringe. While it seems clear that so-called innocent infringers are not covered by this provision, the standard may encroach on the behavior of competitors in knowledge-based markets who may be aware of a potential risk that a product may be considered an infringement (e.g. computer-related inventions), but who cannot be certain due to the nature of the right. This is particularly true for trademarks and patents where the existence of trademark confusion or scope of a patent cannot be fully determined except through litigation.

The second issue is the way in which damages are to be calculated. The focus is not on objective tests but on any “legitimate” measure of value the rightholder puts forward. Article 9.1 ACTA requires that judicial authorities have the authority to consider these measures, but are not necessarily required to take them into account. The judicial authorities may still be able to reject them. Indeed, this may be necessary as that list of measures to be taken into account contains two novel approaches which are problematic and not within the EU IPR Enforcement Directive¹⁸⁹: namely market price of infringing goods based on the concept that each infringing product constitutes a lost sale; and suggested retail price, another proxy for the concept that each infringing product represents a lost sale.

Article 9.3 ACTA also foresees that judicial authorities can order the infringer to pay his profits to the right holder, to pay pre-established damages, a presumption of the harm caused by the infringement or additional damages. This applies, “at least” to all copyright and related rights infringements as well as trademark counterfeiting.¹⁹⁰ However, this latter authority is only mandatory for cases of copyright and trade mark infringement, not for the infringement of designs, patents or geographical indications.

6.2.4. Information related to the infringement

Article 11 ACTA reiterates the safeguard that there shall be no requirement to alter or prejudice existing law on privacy, privilege and confidentiality, but that states must enable their

¹⁸⁷ Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001, at the Fourth WTO Ministerial Conference.

¹⁸⁸ Article 9.1 ACTA

¹⁸⁹ As described in Chapter 3 citing Article 13 of the IPR Enforcement Directive.

authorities to order the alleged infringer to hand over information. It is important to note that this requires a “justified” request by the rightholder. What would be “justified” is apparently left to the law of each Party.

6.2.5. Provisional measures

Provisional measures are applicable in all infringement actions, except for provisions on seizure of goods that are applicable only to cases of copyright or related rights infringement and trade mark counterfeiting. (Article 12.3 ACTA). Thus, according to Article 12.2 ACTA, the rightholder can request such measures without the alleged infringer being notified or present and able to oppose such a request. The request must state a danger of irreparable harm or risk of evidence being destroyed. Balanced with this ease of access for the rightholder is permission for a party to request sufficient evidence, beyond simple assertions, from rightholders as to irreparable harm and risk of evidence being destroyed. However, there appears to be no requirement for a defendant to request the cessation of provisional measures and to oppose the request once goods and evidence have been impounded. Only through the act or failure to act of the rightholder can provisional measures be ended before the conclusion of infringement proceedings. However, it is required that authorities be able to order compensation be paid to the defendant. Read in conjunction with TRIPS Article 50.6, ACTA parties are required to ensure that a defendant does have the opportunity to challenge the imposition of provisional measures within at most 31 calendar days.

6.3. Border Enforcement

6.3.1. In General

The border measures have been the subject of concerns regarding liability of individuals and personal privacy of travelers. There were fears regarding the search and seizure of personal goods and effects of ACTA Party citizens returning from abroad¹⁹¹, as well as significant concerns regarding the effects of including patents in border measures on access to medicines.¹⁹² In the final text, Footnote 6 makes it clear that patents do not fall within the scope of the border measures section. The issue regarding search and seizure of goods and personal effects is somewhat less clear. While an attempt has been made to prevent so-called ‘iPod seizures’, Article 14 ACTA clearly includes small consignments of a commercial nature. Given that elsewhere in the agreement, commercial nature has been taken to include both direct and indirect economic benefit, the scope of this provision is unclear. Article 14.2 ACTA does, however, appear to allow parties to exclude goods in personal luggage but again only if they are of a non-commercial nature. Given how broadly “commercial nature” has been defined in the

¹⁹⁰ See article 9.2, 9.3 and 9.4 of the ACTA Agreement.

¹⁹¹ See e.g. M Geist ‘ACTA’s De Minimis Provision: Countering the iPod Searching Border Guard Fears’ Michael Geist Blog, March 23, 2010 <http://www.michaelgeist.ca/content/view/4900/125/> (Accessed 22.04.2011). See also: Written Question E-1267/10 by Jeanine Hennis-Plasschaert (ALDE) to the Commission.

¹⁹² See e.g. P Maybarduk, ‘ACTA’s Scope and Access to Medicines’ Public Citizen, September 10, 2010. <http://www.citizen.org/documents/ACTAScopeAccessbyPublicCitizen.pdf> (Accessed 22.04.2011).

ACTA, it is not clear what quantity of songs, or audiovisual material on a portable device or computer would constitute enough to become “commercial”.

ACTA also does not oblige parties to apply border measures to parallel imports (Footnote 5 ACTA), although the application of such measures is clearly envisioned.

The use of border measures is almost entirely at the discretion of the rightholder. Nothing in ACTA requires that there be an opportunity for a defendant or alleged infringer to challenge the basis for the suspension of goods. The only way in which such a suspension can be lifted is through a determination of infringement (Article 19 ACTA). The determination of infringement is required to be within a ‘reasonable’ period but many cases in IP disputes (trademark, copyright) last a long time and where these involve competitors on the same market such suspensions can have significant effects on market entry and normal commercial behavior. Article 19 ACTA should be read in conjunction with Article 55 TRIPS, which requires the institution of infringement proceedings within 10 days and an opportunity for a defendant to challenge the suspension of the goods.

6.3.2. In-transit goods

ACTA allows but does not require parties to apply border measures to goods in transit, an area of ongoing controversy between the EU and other WTO members.¹⁹³ Where a party does have in-transit measures, then the applicable law for determining whether or not to suspend the goods is that of the country of transit not the exporting or importing country. (Article 17.1 ACTA). The ACTA provisions do not change existing EU jurisprudence interpreting the application in-transit goods. Within the EU, the concerns regarding the application of in-transit measures have been largely resolved due to the decision by the European Court of Justice in *Montex v. Diesel*. This noted that states cannot suspend in-transit goods based on suspicion that they infringe their own law, unless the domestic rightholder can show interference with the goods by a third party or a real risk of diversion of the goods into the EU market.¹⁹⁴ Under EU law, there can be no act of importation to which suspension procedures would apply to in-transit goods except in circumstances described above. Some uncertainty remains while we await the decision of the ECJ in the *Nokia*¹⁹⁵ case, in which Nokia seeks to compel the UK customs office to suspend goods in transit; even though there is no evidence of interference by a third party or that they will be diverted into the UK market.

¹⁹³ ‘European Union and a Member State – Seizure of Generic Drugs in Transit’ WTO DS408 (11 May 2010) and WTO DS409 (12 May 2010).

¹⁹⁴ Judgment of 9 November 2006 in the matter of *Montex Holding v Diesel SpA*. Case-281/05. [OJ C 326, 30.12.2006, p.16.](#)

¹⁹⁵ Reference for a preliminary ruling from Court of Appeal (England & Wales) (Civil Division) made on 2 December 2009 — *Nokia Corporation v Her Majesty’s Commissioners of Revenue and Customs* (Case C-495/09) OJ C 37, 13.02.2010, p.22.

6.4. Criminal Enforcement

6.4.1. In General

The ACTA negotiations on criminal enforcement are easily the most ambitious. The only other international standards on criminal measures are limited to a single article in the TRIPS Agreement¹⁹⁶ Even the EC itself struggled and failed to establish common internal standards on criminal enforcement. While the outcome is not as ambitious as early (leaked)¹⁹⁷ texts of the ACTA suggested, the section on criminal measures is a clear statement of intent on the part of the contracting parties that, in addition to the usual civil (private) enforcement by intellectual property rightholders,¹⁹⁸ the state has a role to play in combating economic crime through criminal enforcement. It has commonly been understood that criminal enforcement of IPRs should principally serve the interest of the public at large, rather than that the individual rightholder. This is abundantly clear when pirated or counterfeit goods pose a threat to the health or safety, but it is equally appropriate when piracy or counterfeiting is so distortive to competition, that it unravels the basic tenet of a free and fair competitive market. In a competitive market IPRs serve to ensure that there is not only competition and transparency in intellectual and industrial innovation, but also transparency in product markets. This requires that those who invest in innovation should be able to obtain an appropriate return on investment. Pirates and counterfeiters pose a threat to fair competition in that they are typically engaged in trying to capture as large part of the market as they can, prior to detection or seizure of goods and, or their production and distribution operations. It is therefore the scale of economic activity that is relevant to determine whether there is mere infringement of intellectual property or an economic crime that warrants a state response.

6.4.2. Criminal offences

Article 23.1 of ACTA provides for criminal enforcement in case of ‘wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale’. The term ‘commercial scale’ is further defined as being ‘commercial activities for direct or indirect economic or commercial advantage’. This is in contrast to the more flexible market-based definition by the 2009 WTO Panel decision in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.¹⁹⁹ (See Chapter 3 for further analysis of ACTA’s conformity with TRIPS provisions on criminal enforcement.). The standard set by the WTO panel would guide a national court in assessing whether the activities warrant the involvement of a criminal court in view of the impact on the given product market in terms of price, methods of distribution, number of products usually available or sold and volume of trade in a given market. In this respect any

¹⁹⁶ Article 61 TRIPS.

¹⁹⁷ *Consolidated Text: Anti-Counterfeiting Trade Agreement Informal Predecisional Draft* 1 July 2010 http://www.laquadrature.net/files/ACTA_consolidatedtext_EUrestricted130710.pdf (Accessed 22.04.2011).

¹⁹⁸ As is clearly stated in the preamble of the TRIPS Agreement, ‘intellectual property rights are private rights’, and therefore their enforcement is principally the responsibility of the rightholder.

¹⁹⁹ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs)*, WT/DS362/R, 09/0240, 26/01/2009.

attempt to frame commercial scale in terms of whether 500 copies constitute 'piracy at a commercial scale' is incorrect.

6.4.3. ACTA Article 23.2

When considering trademark counterfeiting and copyright and related rights counterfeiting, it is of importance to realize that, the exclusive right of the trademark holder covers the use of the mark in the course of trade, and is therefore confined to economic actors. This explains why in relation to labels and packaging Article 23.2 ACTA extends the scope of application to acts of wilful importation and domestic use.

The wording of this Article confines its scope to acts of (wilful) importation only, and therefore would not cover transshipment. There is, however, a concern in relation to parallel imports. The definition of 'counterfeit trademark goods' considers the lack of authorization by the rightholder sufficient to render goods counterfeit. The term 'authorization' is, however, not further elaborated and may also extend to the lack of contractual authorization.²⁰⁰ This means that goods that are genuine in terms of their production process, may become infringing due to breach of contractual limitations. Contractual terms may impose limitations on the licensed producer to produce, for example a limited number of units only, or market them in a certain number of territories only. When these are broken, it raises the question of whether this should affect further trade in these items. The principle of EU (EER) exhaustion²⁰¹ furthermore extends rights to EU rightholders to prevent the importation of goods for which they have not given their consent in terms of importation and marketing. Since many of the parallel importation disputes revolve around the question of whether there is consent, or a contractual breach, it is not appropriate for criminal sanctions to be applied. The European Parliament in Article 1 of its Position²⁰² suggested that parallel imports should be specifically excluded from the scope of criminal offences. ACTA currently does not provide for such an express exclusion.

6.4.4. ACTA Article 23.3

In relation to the criminal enforcement in relation to cinematographic works, ACTA prompts Contracting Parties to implement criminal measures for the unauthorized copying of cinematographic works. Although the optional nature of this provision suggests there is also leeway for the way in which such a measure is implemented by a Party. ACTA is silent in this respect and does not impose the commercial scale assessment (note that the China WTO case

²⁰⁰ The Commission's response to the Opinion of European academics fails to fully address this issue. See "Commission Services Working Paper" 27 April 2011. Available at: http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf (Accessed 9.05.2011), p12. Since lack of authorization is included in the definition what 'counterfeit' the key question is the definition of counterfeit, not the definition of legitimate' which is not in the ACTA text. It is precisely the lack of clarity of definition that is at issue, and which the Commission fails to address.

²⁰¹ *Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft GmbH*. ECJ, 16 July 1998, Case C-355/96

²⁰² Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE_TC1-COD(2005)0127).

discussed above²⁰³ involved copyright in cinematographic works), and the wilful intent criteria. Furthermore the general concerns in relation to copyright expressed by the European Parliament already noted above²⁰⁴, remain applicable to this case.

6.5. Digital Enforcement – Combating uses of the Internet for Piracy and counterfeiting

Once one of the more extensive pieces of the ACTA framework, this section has been significantly pared down, especially with respect to liability of internet service providers. A review of the leaked 1 July Consolidated text²⁰⁵ shows extensive provisions relating to: liability of online service providers, including restricted safe harbours; takedown or removal of material at the request of rightholders; and third party secondary, and contributory liability. In prior proposals put forward by other parties²⁰⁶, provisions for the cutting-off of internet service of infringers (so-called three strikes provisions) were also put forward, although these did not appear in later texts.

In contrast, what we have now in the agreement does not bear out any of the fears regarding this section that were a staple of questions for European parliamentarians (see Chapter 2 for more discussion). Article 27.1 essentially applies all the procedures and standards for civil and criminal enforcement to the digital environment. However, Footnote 13 preserves any party's system for ISP liability limitation. It also preserves any laws that are aimed at preserving free expression, fair process and privacy.

There is no so-called three strikes provision requiring Parties to cut off internet access for infringers, but there are measures aimed at requiring ISPs and other intermediaries to provide information about subscribers to rightholders on request. However, this provision is not mandatory. There is no requirement for takedown notices. However, the normal procedures for injunctions and provisional measures will be applied in the digital environment.

With respect to technological protection measures (TPMs), for which all WIPO Copyright Treaty parties are required to provide adequate and effective protection, the ACTA elaborates on and details the ways in which such protection should be extended. For the EU, these remain within the framework of the Information Society Directive (2001/29/EC).

Perhaps most importantly, with respect to TPMs, Article 27.8 ACTA preserves the right of parties to maintain existing exceptions and limitations to rights and to adopt new ones as they see fit. This maintains the EU *acquis* established by the Information Society Directive in its article 6 and allows the crafting of new exceptions and limitations.

²⁰³ China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China – IPRs), WT/DS362/R, 09/0240, 26/01/2009.

²⁰⁴ Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE_TC1-COD(2005)0127).

²⁰⁵ http://www.laquadrature.net/files/ACTA_consolidatedtext_EUrestricted130710.pdf (Accessed 22.04.2011).

²⁰⁶ See 'European Union's Comments To The US Proposal Special Requirements Related To The Enforcement Of Intellectual Property Rights In The Digital Environment' 29 October 2009. See <http://blog.die-linke.de/digitalelinke/wp-content/uploads/674b-09.pdf> (Accessed 22.04.2011). This is also a leaked document.

6.6. Institutional Arrangements

The ACTA Agreement provides for institutional arrangements that are best compared to those of bilateral or regional trade agreements, such as those of the EU (and US) with South Korea,²⁰⁷ and Colombia and Peru.²⁰⁸ ACTA does not establish any WTO-like dispute settlement system, nor does it make disputes subject to any international tribunal. It does not require mandatory arbitration. Instead, Chapter V of ACTA establishes 1) the ACTA Committee, 2) contact points and 3) consultations.

The ACTA Committee will be composed of representatives of each Party²⁰⁹ and will meet at least once a year, unless the Committee decides otherwise.²¹⁰ It will take decisions by consensus,²¹¹ meaning that a decision is adopted if no Party present at the meeting formally objects to the proposed decision. Shortly after the entry into force of the agreement, the Committee will adopt rules and procedures on the chairing and hosting of meetings, the performance of organizational duties and the granting of observer status.²¹² This seems to be the only provision that addresses the relationship with third parties. However, it is entirely unclear which parties might be able to get observer status, whether that would include international organizations in the field of IP enforcement, non-state actors or merely states interesting in becoming a contracting party. It seems to be of crucial importance to establish a coordination framework with certain parties and organizations in order to fulfill one of the Committees duties, namely to avoid any unnecessary duplication with other international efforts regarding the enforcement of intellectual property rights.²¹³ Redundancy in efforts can become a real danger for an institutional framework that will deal with issues already addressed by other institutions, such as the WTO, WIPO or WCO.

Furthermore, the Committee will perform a number of tasks that include:

- reviewing the implementation and operation of ACTA;
- considering the development of ACTA and proposed amendments thereto;²¹⁴
- deciding upon terms of accession to ACTA; and
- considering any other matter affecting the implementation and operation of ACTA.²¹⁵

In doing so, the Committee may establish *ad hoc* committees or working groups, seek advice from non-governmental persons, make recommendations regarding the implementation and

²⁰⁷ See Article 15.1 – 15.6 of the EU-South Korea FTA and articles 22.1 and 22.2 of the US-South Korea FTA

²⁰⁸ See article 12 – 16 of the EU-Colombia-Peru FTA and articles 20.1 – 20.3 of the US-Colombia FTA and the US-Peru TPA.

²⁰⁹ See Article 36.1 ACTA.

²¹⁰ See Article 36.10 ACTA.

²¹¹ See Article 36.4 ACTA.

²¹² See Article 36.5 ACTA. When the Committee amends the rules and procedures, it will also act by consensus. However, during the first five years after entry into force, consensus must be reached among the Parties and the signatories not yet ACTA Parties. See Articles 36.6 – 9 ACTA.

²¹³ See Article 36.12 ACTA.

²¹⁴ Amendments are accepted and ratified by ACTA Parties, the Committee decides whether a proposed amendment shall be presented to the parties. See article 42.1 ACTA.

²¹⁵ See Article 36.2 ACTA.

operation of the Agreement, share information with third parties on reducing IPR infringements and take any other action in exercise of its functions.²¹⁶ A task clearly excluded from its mandate is the supervision of domestic or international enforcement investigations of specific IP cases.²¹⁷

In order to facilitate communication between the Parties, each Party designates a contact point to assist in any request from another Party.²¹⁸ These contact points may gain an important role as ACTA Parties have chosen to make do without a Secretariat, which was still foreseen in the draft text of April 2010.²¹⁹

Finally, ACTA Parties have chosen to adopt rules on consultations between the Parties. Accordingly, an ACTA Party shall request consultations with another Party in writing and the respondent Party shall accord sympathetic consideration to such request.²²⁰ The information will be kept confidential and Parties may notify the Committee of the result of consultations.²²¹ ACTA does not explicitly refer to dispute resolution, other than stating that consultations will not affect any rights and obligations in other proceedings.²²² This is in stark contrast to most bilateral or regional trade agreements, which provide for detailed rules on dispute settlement.²²³ In addition, the ACTA Committee has no role in dispute resolution. As a consequence, ACTA Parties can choose any dispute resolution system they prefer provided that the parties agree on an *ad hoc* basis to which arbitration tribunal or judicial venue they will bring the dispute. Any *ad hoc* dispute resolution will require the consent of the parties to the dispute on the choice of forum. The WTO Dispute Settlement mechanism may be a conceivable mandatory forum if an ACTA Party which is also a WTO Member drafts its claims in a way that a benefit from the TRIPS Agreement, rather than under ACTA, is nullified or impaired by another WTO Member.²²⁴ In that case, the WTO Panel will assess the claim according to TRIPS rules which it interprets according to customary rules of interpretation of public international law.²²⁵ In this interpretation, subsequent agreements between the parties, such as ACTA, may be taken into consideration and thus influence the evolution of WTO jurisprudence.²²⁶ This is different from a situation where the claims are drafted to a breach of ACTA rules alone, which would be outside the competence of WTO Panels.²²⁷

²¹⁶ See Article 36.3 ACTA.

²¹⁷ See Article 36.11 ACTA.

²¹⁸ See Article 37 ACTA.

²¹⁹ See Article 5.2 of the draft text of April 2010.

²²⁰ See Article 38.1 ACTA.

²²¹ See Article 38.3 ACTA.

²²² See Article 38.2 ACTA.

²²³ See as examples the chapters twenty-one of the US-Colombia FTA and the US-Peru TPA and chapter twenty-two of the US-South Korea FTA; chapter 14 of the EU-South Korea FTA; title XI of the EU-Colombia-Peru FTA.

²²⁴ See Article 64 of the TRIPS Agreement *juncto* Article XXIII of the GATT of 1994.

²²⁵ See Article 3.2 second sentence of the Dispute Settlement Understanding.

²²⁶ For an analysis of the possible problems in such an interpretation, see A Dahrendorf, 'Free Trade Meets Cultural Diversity: The Legal Relationship Between WTO Rules and The UNESCO Convention on the Protection of the Diversity of Cultural Expressions', in Schneider and Van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (2008), Intersentia, Maastricht, pp. 62 – 65.

²²⁷ See Article 3.2 of the Dispute Settlement Understanding.

7. SECTOR SPECIFIC ANALYSIS

7.1. Civil Liberties

The most controversial enforcement proposals contained in earlier draft versions of ACTA have been abandoned or narrowed down.²²⁸ There are no ‘three strikes’ rules in relation to illegal downloading, no liability for internet service providers (ISPs) other than for direct infringement. Some issues still remain, especially in Section 5, the digital chapter of ACTA. The disclosure of subscriber’s information regime, Article 27.4 ACTA, is applicable to infringing, and non-infringing intermediaries. As such it is broader than the TRIPS norm contained in Article 47 TRIPS, which imposes such a regime on infringing intermediaries only. ACTA contains an express qualification that enforcement proceedings in relation to infringement of copyright or related rights over digital networks, as well as any legitimate request for subscriber information in relation to accounts allegedly used for infringement be subject to safeguards.²²⁹ The mechanisms to ensure that these rights are maintained have, however, to be found outside of ACTA.²³⁰

The provisions on legal protection against the circumvention of effective technological protection measures are covered in Chapter 5 and lie within the standards established by the Information Society Directive. There are no changes with respect to the EU’s civil liberties and privacy standards.

7.2. Access to Medicines

The first thing to note is that access to medicines is affected by two major IP categories: patents and trademarks. How these are treated by the ACTA therefore affects how the EU will manage its domestic market for access to medicines as well as how well it will meet its international obligations on public health.

Within the EU, ACTA will have little impact on existing practices between stakeholders in the medicines market. Regarding patents, the provisions on civil enforcement are in line with those of the EU and ACTA is clear that border measures²³¹ do not apply to patents and undisclosed information nor do criminal enforcement measures. In fact, a Party may exclude patents from the civil enforcement sections as well, which may go a long way to removing access to medicines concerns within the EU.²³²

²²⁸ Consolidated Text: Anti-Counterfeiting Trade Agreement Informal Predecisional Draft 1 July 2010 http://www.laquadrature.net/files/ACTA_consolidatedtext_EUrestricted130710.pdf

²²⁹ Articles 27.2 and 27.4 ACTA.

²³⁰ See for example EU Directives 95/46/EC, 2002/58/EC, and 2006/24/EC, dealing with privacy; Article 8, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14.

²³¹ ACTA Footnote 6.

²³² ACTA Footnote 2. The European Generic Association has already requested the EC exclude patents from its implementation of the ACTA provisions on civil enforcement. See <http://keionline.org/sites/default/files/EGAletterMEPSACTA2010.pdf> (Accessed 22.04.2011).

Where patents are subject to the section on civil procedures, there are several relevant provisions that bear examination with respect to injunctions, provisional measures and border measures, which are only briefly examined below as these have also been analyzed in Chapter 5. Trademarks are a significant subject for competition in the medicines market. In terms of advertising, generic medicines manufacturers often need to ensure that consumers are informed that their products are substitutable for particular brand names. This is a fertile arena for litigation which can result in a delay of the entry into and penetration of generic products into a market. This is particularly true for generic medicines produced in third countries. For trademarks, all the provisions of the ACTA are applicable, including criminal enforcement. But the definition on counterfeit trademark goods means that criminal enforcement is limited to goods that use identical or indistinguishably similar marks, which is of little relevance for normal competitive practice in the pharmaceutical market. It should however, capture those activities that have the potential to harm public health where fake medicines are labeled with valid brand names and generic trademarks.

The following sections examine specific elements that may be of concern with respect to access to medicines and generic market entry.

7.2.1. Injunctions

When abused, injunctions are a tool that can be used to prevent market entry. ACTA only requires that judicial authorities have the power to issue such injunctions. It does not limit the use of safeguards designed to ensure that such injunctions can be challenged.

There is a special provision (Article 8.2 ACTA) on injunctions, which makes it possible for a member state to exclude goods produced under a compulsory licence from the application of injunctions provided that the licence itself complies with TRIPS Article 31 and other relevant articles. Parties may limit remedies to remuneration as an alternative to injunctions. It is difficult to imagine a situation where products could be produced according to a legitimate compulsory licence in an ACTA party and yet be found to infringe a mark and require a remedy. Where the challenge is to the validity of the compulsory licence, Article 8.2 ACTA seems to suggest that normal remedies would then be available. Where injunctions are applied before any determination of infringement, Article 8.2 is simply meant to exclude the application of injunctions from such goods, either on the basis of patent or trademark protection. What confuses the issue is the condition that the Party's compulsory licence must itself be compliant with TRIPS Section II. Since such a determination would be part of a legal challenge, this suggests the possibility that some precursor determination of the validity of the licence would take place. The provision therefore needs to be clarified to ensure that at no time should products produced under compulsory licence be subject to injunctions. The issue of whether such licences are valid or in compliance with TRIPS should be a separate issue and not a condition for the exercise of the exclusion in Article 8.2 ACTA.

7.2.2. Border measures

As noted before, border measures do not apply to patents and undisclosed information. This includes goods in transit, an issue which is the subject of ongoing consultations between the EU

and other WTO members such as Brazil and India.²³³ ACTA will have no bearing on the legal issues raised in those consultations as they relate to patents.

However, border measures are clearly applicable to trademarks and may therefore be the cause of some concern. ACTA allows but does not require parties to apply border measures to goods in transit, an area of ongoing controversy within the EU and subject to a forthcoming decision of a recent case at the ECJ. The ECJ may settle the issue once and for all if it adopts the opinion of the Advocate general that application of in-transit procedures is inappropriate.²³⁴ Nevertheless, where a party does have in-transit measures, then the applicable law for determining whether or not to suspend the goods is the country providing the transit procedure, not the exporting or importing country (Article 17.1 ACTA). While the EU itself is struggling with this issue, if ACTA makes border measures applicable to in-transit goods, there could be an impact on trade in legitimate goods from third parties such as China, India or Brazil that transit their goods through an ACTA party. This could pose a threat to trade in generic medicines, especially where claims are based on an infringement regarding similar marks, trademark dilution, unfair advantage or damage to reputation as encompassed by the Community Trademark Regulation.²³⁵ As *Medecins san Frontieres* notes “civil trademark disputes will likely remain a common occurrence in the pharmaceutical field as companies will often choose brand names for medicines that sound inevitably similar, in that they are derived from the drugs international non-proprietary name (INN).”²³⁶ The issue of in-transit goods can be addressed simply by not applying ACTA’s optional provision on transit goods. There may however, still remain a concern with respect to access to medicines for the EU’s own citizens that can only be fully addressed by an interpretation of Article 13 ACTA that excludes pharmaceutical products from the scope of border measures. ACTA requires that border measures be extend to all acts of actual importation into the EU, in which cases, the issues regarding similar or confusing trademarks identified above would also arise.

7.2.3. Criminal Enforcement

Criminal enforcement applies only to wilful trademark counterfeiting, see Chapter 5 of this study. There is, however, a concern in relation to parallel imports since the definition of ‘counterfeit trademark goods’ considers the lack of authorization by the rightholder (Article 5(d) ACTA) as sufficient to render goods counterfeit. As Chapter 5 pointed out many of the parallel importation disputes revolve around the question of whether there is consent, or a contractual breach, so that ACTA may enable criminal sanctions to be applied to parallel imports purely because of a contractual difference. Otherwise there are no real concerns regarding generic market entry into the EU market as ACTA only requires the parties to apply criminal enforcement

²³³ *European Union and a Member State – Seizure of Generic Drugs* WTO/DS408 and WTO/DS409, Available at www.wto.org (Accessed 22.04.2011).

²³⁴ *Nokia Corporation v Her Majesty's Commissioners of Revenue and Customs and The International Trade Mark Association*, ECJ Case C-495/09, O.J. C 37/22, 13.2.2010.

²³⁵ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

²³⁶ MSF ‘The Secret Treaty: Anti-Counterfeiting Trade Agreement (ACTA) and its Impact on Access to Medicines’ MSF Campaign for Access to Essential Medicines, October 2010, Footnote iv.

to wilful trademark counterfeiting of identical or indistinguishably similar marks (Article 23.2 ACTA).

7.2.4. TRIPS and the Doha Declaration on Public Health

ACTA parties have made a point of reiterating commitments to public health made in the TRIPS context. As noted in Chapter 3 above there are some issues relating to trademarks that may raise concerns regarding the Doha Declaration on Public Health, but ACTA can be framed to allow access friendly implementation and there are few or no problems for access to medicines issues relating to patents.

7.3. Geographical indications

One of the biggest achievements of the EU in the ACTA negotiations is that geographical indications are covered.²³⁷ More specifically, ACTA rules on civil enforcement and border measures apply fully to geographical indications (GIs).²³⁸ Earlier drafts of ACTA revealed that several negotiating parties favoured limiting the mandatory civil enforcement rules and border measures to copyrights, related rights and trade marks only.²³⁹ So the inclusion of GIs can be seen as a success for the EU. However, criminal enforcement does not apply to GIs, being limited to wilful trademark counterfeiting and copyright or related rights piracy on a commercial scale.²⁴⁰

A further more important limitation to the coverage of GIs is in Article 3.2 ACTA, which states: "This Agreement does not create any obligation on a Party to apply measures where a right in intellectual property is not protected under its laws and regulations." In other words, those ACTA Parties that do not have substantive national law covering GIs are under no obligation to apply the enforcement rules in ACTA to this field of law. This Article is particularly relevant because a number of countries including the United States²⁴¹ do not recognize GIs as such and offer no protection for them. These countries will therefore not be under any obligation to apply ACTA's enforcement rules to GIs.

Three aspects relevant for geographical indications in ACTA will be addressed in greater detail in the following: 1) the protection provided by ACTA for geographical indications and their impact on the EU's legislation, 2) the non-applicability of the criminal enforcement section to

²³⁷ Statement of Trade Commissioner Karel de Gucht on October 20th in front of the International Trade Committee INTA in the European Parliament, see also <http://christianengstrom.wordpress.com/2010/10/26/no-geographical-indications-in-acta/> (Accessed 22.04.2011).

²³⁸ See Article 2.1 and 2.2 juncto 5 (h) ACTA; Article 7.1 ACTA; Article 13, footnote 6 ACTA.

²³⁹ These countries are the United States, Singapore, Canada, Australia and New Zealand. Japan also favoured limiting the application of civil enforcement measures to copyrights and related rights and trade marks, but not for border measures. Mexico took exactly opposite positions. See section 1, Article 2.1.1 and section 2 Article 2.X on Scope of border measures of the August 2010 Draft.

²⁴⁰ See Article 23.1 ACTA.

²⁴¹ This is also the case for Australia, Japan and South Korea. The other Parties Canada, New Zealand, Mexico, South Korea, Morocco, Singapore, Switzerland have established systems of protection geographical indications under particular GI laws.

geographical indications and its implications for the EU, and 3) no GI enforcement in countries that do not recognize GIs.

7.3.1. Protection provided by ACTA

Civil enforcement and border measures are two important categories of measures in ACTA that apply to GIs. (See chapter 5 for a more detailed discussion of these). A short summary of the measures as they apply to GIs is provided here.

First, judicial authorities of ACTA Parties have the power to order the knowing infringer to pay damages adequate to compensate the injury of the right holder.²⁴² They also have the authority to determine damages based on any legitimate value the right holder submits, including lost profits, value of infringed goods by market price or suggested retail price.²⁴³ Judicial authorities can also order the infringer to pay his profits to the right holder, to pay pre-established damages, a presumption of the harm caused by the infringement or additional damages.²⁴⁴ This latter authority is only mandatory for cases of copyright and trade mark infringement, not for the infringement of designs, patents or GIs. But ACTA Parties may choose to apply this power to other IP infringements and the EU has already done so for all forms of intellectual property infringement covered by Directive 2004/48,²⁴⁵ including GIs.

Second, ACTA parties are only obliged to grant powers to judicial authorities to order the destruction of goods with respect to pirated copyright goods and counterfeit trade mark goods.²⁴⁶ But ACTA parties are free to extend this power to other cases of intellectual property infringement, as the EU has already done.²⁴⁷

Third, ACTA envisages the use of provisional measures to prevent an infringement of any intellectual property right, to prevent infringing goods from entering the channels of commerce and to preserve relevant evidence.²⁴⁸ Judicial authorities may even order such measures without having heard the defendant provided certain conditions are fulfilled.²⁴⁹ Again the obligation to provide judicial authorities with power to seize suspected goods or to take such goods, materials and documentary evidence into custody, is limited to copyright or related rights infringement and trade mark counterfeiting.²⁵⁰ But again the EU has made use of the option to establish this authority for other cases of intellectual property infringement.²⁵¹

On the other hand border measures apply to the same extent to infringements of all forms of intellectual property, except for patents.

²⁴² See Article 9.1 first sentence ACTA.

²⁴³ See Article 9.1 second sentence ACTA.

²⁴⁴ See Article 9.2, 9.3 and 9.4 ACTA.

²⁴⁵ See Article 13.1 (b) of Directive 2004/48.

²⁴⁶ See Article 10 ACTA.

²⁴⁷ See Article 10 of Directive 2004/48.

²⁴⁸ See Article 12.1 ACTA.

²⁴⁹ See Article 12.2 ACTA.

²⁵⁰ See Article 12.3 ACTA.

²⁵¹ See Article 9.1 (b) of Directive 2004/48.

7.3.2. Criminal enforcement

As elaborated in Chapter 5 above, the EU does not yet have a harmonized system of criminal sanctions for IP infringements. ACTA will not change the status quo so there will remain no harmonized criminal measures for GI infringements.

7.3.3. No GI Enforcement in Countries that do not have a System of GI Protection

As mentioned above according to Article 3.2 ACTA, Parties that do not have substantive law in an area of intellectual property are under no obligation to apply ACTA enforcement rules to this field of law. In the area of GIs a number of countries that are parties to ACTA do not have a system of GI protection in place. These are the United States, Australia, Japan and South Korea. As a consequence, these countries do not have to apply the agreed enforcement standards to products falsely carrying a GI that is protected in the EU and destined to be marketed in the EU. ACTA therefore does not provide EU GI owners with an additional means for enforcement of their GIs in these countries beyond existing alternative regimes.

The fact that these countries do not have a system of protection for GI does not mean that indications of origin have no protection. Countries such as the United States²⁵² use existing trade mark law to protect GI as required by the TRIPS Agreement. In this regard, certification marks play an important role. Certification marks inform the consumer that the goods/services carrying the mark possess certain characteristics, such as an origin in a particular region or a possession of a certain quality. Any entity that meets the certifying standards is entitled to use the mark. Its owner makes sure that the mark is only used by certified users and for certified goods/services. As certification marks enjoy the same protection that ACTA provides for trade marks, a GI that satisfies such a certification may benefit from the additional protection that ACTA provides for trademarks.

To sum up ACTA does not change the substantive law of ACTA Parties with regard to GIs. The enforcement rules will not apply in countries that do not recognize *sui generis* GI protection. European GI holders may use the certification mark system instead as this provides them with an alternative protection to which ACTA enforcement rules will fully apply including the benefit of the criminal enforcement measures in cases of wilful trade mark infringement on a commercial basis.

8. RECOMMENDATIONS

8.1. Primary Recommendation

Categorical recommendations regarding the Parliament's responses to ACTA are not possible from the analysis conducted so far. However, it is possible to point to the broader issue of compatibility with international and EU obligations of EU ACTA Parties and suggest ways that

²⁵² See United States Patent and Trademark Office, Geographical Indication Protection in the United States, http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf (Accessed 22.04.2011).

they may be ameliorated by the parliament. As the primary recommendation this study would recommend that:

- ***unconditional consent would be an inappropriate response from the European Parliament given the issues that have been identified with ACTA at it stands.***

8.2. Recommendation Regarding the Relationship with the TRIPS Agreement and the Doha Declaration on TRIPS and Public Health.

In the international arena, especially with respect to access to medicines, ACTA itself is not incompatible with EU member states obligations under or support for the Doha Declaration on TRIPS and Public Health ('Doha Declaration'). However, the manner in which member states implement the ACTA may pose problems. If the Parliament decides to give its consent this should be conditional on the inclusion of statements that provide interpretation and guidance on how member states should apply ACTA in a way that complies with EU member states international obligations.

In particular we recommend the Parliament consider that its conditional consent include:

- ***annotating the text with additions from the TRIPS Agreement outlining the mandatory safeguards that ACTA has omitted to mention in areas such as provisional measures;***
- ***annotating the text, with an accompanying resolution, with additions from the TRIPS Agreement outlining the optional safeguards that ACTA has left open to be implemented in a manner supportive of the Doha Declaration on TRIPS and Public Health. In particular, the European Parliament should address the matter of border measures by recommending that member states exclude patents from the application of in- transit procedures. Such procedures should be limited to counterfeit trademark goods as defined by ACTA Article 5(d). This is possible because the application of in-transit procedures is an optional element of ACT;***
- ***an accompanying statement to the EU instrument ratifying ACTA that Article 13 is interpreted by the European Union in such a way as to allow the exclusion of pharmaceutical patents and trademark infringements other than counterfeit trademark goods from the application of border measures, especially in-transit procedures.***

8.3. Recommendations Regarding Conformity with the EU Acquis

In light of the analysis conducted, it can be argued that the provisions of ACTA appear to be, in most cases, in line with the EU *acquis communautaire*. However, in some cases, ACTA is arguably more ambitious than EU law, providing a degree of protection that appears to go beyond the limits established in EU law. Therefore:

- ***for those European Parliamentarians for whom conformity with the EU Acquis is sine qua non for granting consent, this study cannot recommend that they provide such consent to ACTA as it now stands.***

We do not consider it possible for the European Union to limit, unilaterally, the application of border measures, with respect to copyright and trademarks, only to counterfeit trademark goods and pirated copyright goods, as is the case in the IPR Customs Regulation.²⁵³ While Article 13 ACTA provides some ability to address concerns related to access to medicines by excluding patents and trademarks on medicines, the application of border measures beyond that would, arguably, not be considered “justifiable discrimination” under Article 13 ACTA.

We do not consider the requirement that ACTA parties enable judges to consider market price and suggested retail prices as measures for damages²⁵⁴ to fall within the requirement in the IPR Enforcement Directive of “*appropriateness of the damage to the actual prejudice suffered.*”²⁵⁵ While there is enough room for legal argument regarding this issue, it is insufficiently clear as a matter of treaty interpretation whether other ACTA parties would consider the EU to be in violation of its obligations if it did not amend its Directive to include market price and suggested retail price in damages calculations.

For those European Parliamentarians for whom conformity with the existing EU Acquis is not sine qua non, such consent should consider modifications that include:

- ***Amending Article 2 of the IPRs Customs Regulation to include, within the scope of border measures, all violations of trademark and copyright infringements.***
- ***Seeking clarification, before ratification of ACTA, from the European Court of Justice that the criteria envisaged by the ACTA for the quantification of the compensatory damages would not amount to a violation of the criterion of “appropriateness of the damage to the actual prejudice suffered” envisaged in the Enforcement of IPRs Directive;***
- ***Creating a legislative framework for how information sharing under ACTA should take place, based on the “Opinion of the European Data Protection Supervisor.”***²⁵⁶

Special Issues with Respect to Criminal Measures

Criminal Enforcement measures do not fall within the EU *Acquis*. The ACTA negotiations have, however, created a hybrid situation wherein the Presidency of the Council negotiated these measures within ACTA on behalf of the member states, under a mandate with which European and national parliamentarians were largely unfamiliar. There are significant questions regarding the role that the European Parliament can play in this regard. However, given the previous experience of the Parliament in the negotiation of the *European’s Commission proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights*,²⁵⁷ there are some clear recommendations that the

²⁵³ Council Regulation No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

²⁵⁴ Article 9.1 ACTA

²⁵⁵ Article 13 IPR Enforcement Directive

²⁵⁶ OJ C 147/1, 5.6.2010.

²⁵⁷ COM/2005/0276 final, as amended by COM(2006) 168 final.

Parliament may make regarding member state implementation of the criminal provisions of ACTA. To ensure that ACTA does not by-pass normal legislative harmonisation procedures in the EU, we recommend that:

- ***the European Parliament should make it clear that its consent to ACTA as a whole is conditional on member states, represented by the Council, committing to implement ACTA in a manner that maintains the safeguards and scope that the Parliament outlined in the previous legislative attempt at harmonisation of criminal enforcement of intellectual property.***²⁵⁸

8.4. Evaluating the Consequences of Postponement or Rejection

The recommendations above regarding conditional consent suggest that, at the least, a delay may be required in the EU's ratification of ACTA while clarification is sought on some points. The length of such a delay is difficult to predict but, as a general principle, the Parliament can postpone consent until the issues this study (and others) have raised are fully addressed by the proper interpretive bodies. Assurances provided by the Commission are an insufficient basis for taking on international legal obligations where the scope of these legal obligations is unclear.

8.4.1. Postponement

The primary concerns with any delay are whether: 1) EU citizens will miss out on additional advantages provided by ACTA as other parties ratify and implement the Agreement; 2) a delay by the EU will affect other Parties' commitment to ratify the agreement.

With regard to the first point, an examination of the additional short term advantages of ACTA for EU citizens suggests that there will be little or no effect from a delay. The US administration has stated its position that ACTA will not require any changes to US laws. In countries where changes are required one can expect lengthy debates in national legislatures on how best to implement ACTA. Those ACTA parties that may need to change their law to implement ACTA (e.g. Mexico), will also have to undergo a process of creating legislation to implement ACTA. Given the short time involved in clarifying the issues identified by this study, the consequences of postponement do not appear to pose any significant threat to additional advantages that ACTA will provide to EU citizens.

On the second point, it is difficult to assess whether a postponement by the EU will delay ratification by other ACTA parties or encourage rejection. Given the media attention and discussion on ACTA developments in the EU will clearly feed into the debate in other ACTA parties. However, it is more likely that the debates in other countries will revolve around domestic issues and interests rather than what the EU is doing.

More generally, this study finds it difficult to point to any significant advantages that ACTA provides for EU citizens beyond the existing international framework. The lack of participation

²⁵⁸ European Parliament legislative resolution of 25 April 2007 on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD)).

by major emerging economy partners such as China, India and Brazil means those countries that are a major source of competition and infringement for the EU are not included. There is no additional advantage with respect to geographical indications as countries that do not provide protection for GIs are not required to apply ACTA measures to them (see Chapter 6 – Sectoral Analysis).

Finally, there may be a sense in which the purpose of the postponement may itself be considered a form of rejection, both by other EU institutions, as well as other ACTA Parties. Where the request from the European Parliament may be considered a request to re-open negotiations on issues already closed, and Parliament makes its consent conditional on resolution of that issue, refusal, or inability to comply, may result in a de facto rejection of ACTA by the parliament. Thus a request to ensure that Article 13 be interpreted to allow the EU to exclude, as a general matter, non-piracy and non-counterfeit infringements from the scope of border measures could be legitimately considered a re-opening of an issue on which other ACTA parties had legitimate expectations. Nevertheless, given the uncertainties, it may be necessary to seek out such clarification if the conformity of ACTA with the EU *Acquis* is to be ensured. The rejection scenario is dealt with below.

8.4.2. Rejection

Rejection of a treaty text for which the parliament itself provided a mandate would be a drastic step. This could only be considered if the agreement is significantly beyond the mandate provided to the Commission. There have been repeated statements by both the Commission and the Parliament that ACTA should not and would not go beyond the EU *Acquis*. Rejection could be justified if the ACTA went significantly beyond the EU *acquis*. The analysis in this study suggests that while there remain questions with regard to specific provisions and certainly about border measures, it would be difficult to argue that ACTA as a whole goes **significantly** beyond the EU *acquis*. Thus rejection may not be an appropriate.

Rejection of ACTA by the EU would clearly result in ACTA being considered a failure and could affect the ratification of the Agreement by other negotiating partners. As one of the two key major negotiating partners, the EU's participation is considered essential for ACTA to achieve its goals. Given the resources that were put into the negotiations, rejection would entail a significant cost for no return on the part of the EU. It is important to note however, that ACTA does not enjoy universal support in the other ACTA parties and faces significant ratification hurdles in the US, Australia, and Canada and could still be rejected by legislatures in those countries. This would inevitably feed into the EP assessment.

From a strategic viewpoint, rejection of ACTA by the European Parliament may have a negative effect on the overall strategy of the EU for enforcement of intellectual property rights in third countries.²⁵⁹ Even if some major developing country economies are not included in the negotiations, the ACTA may still serve as a standard for international best practice in IPR enforcement. However, for the reasons discussed in Chapter 2, ACTA may not be able to play

²⁵⁹ European Commission, *Global Europe: Competing in the World*, 2006. See http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (Accessed 22.04.2011).

that role as strongly as was intended at its inception. The lack of proper institutions and the fact that its standards are generally lower than those achieved by the US and EU in their bilateral and regional free trade agreements suggest that the strategic benefit of ACTA will be limited. Rejection of ACTA may simply mean that the EU will have to place greater emphasis on the bargaining power it has in bilateral and regional free trade agreements. To the extent that enforcement remains off the negotiating table in multilateral fora such as WIPO and the WTO, the emphasis is likely to remain on bilateral and regional free trade agreements. Of course, such an outcome may be likely even if ACTA is ratified and enters into force (see analysis in Chapter 2).

Finally, any analysis of the rejection must assess whether the loss of potential benefits for EU citizens outweigh the costs of ratifying ACTA. A fair assessment would suggest that the EU was very successful in its defence of existing EU policy but achieved little in terms of its offensive interests in getting major infringing countries to change their laws. Rejection would therefore entail little loss of benefits for EU citizens. There may however, be costs in terms of damaged political capital with the ACTA negotiating partners, the sunk costs in the negotiations and reduced prospects for stronger enforcement of IP rights in the future. In contrast, the costs of ratification are not great provided the issues identified above are clarified and properly framed. There would of course need to be an evaluation of whether the ACTA could be considered to pre-empt important domestic debates, but some of these concerns could be addressed by using a postponement of ACTA ratification to have those debates now.

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